'08 CV 541 L RBB

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 17 2008
J. T. NOBLIN, CLERK
BY ______ DEPUTY

FILED
08 MAR 20

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JON P. FUSCO, JO ANNE FUSCO,
and KEN CARTER **PLAINTIFFS**

BY: DEPUTY

vs. **CIVIL ACTION NO. 3:08cv112-HTW-LRA**

JENNY CRAIG, INC., and
JENNY CRAIG INTERNATIONAL, INC. **DEFENDANTS**

CONSENT ORDER TRANSFERRING CIVIL ACTION

THIS MATTER is before the Court on the request of Defendants Jenny Craig, Inc., and Jenny Craig International, Inc., to transfer this action to the United States District Court for the Southern District of California, see Docket No. 3, and the consent of Plaintiffs to the requested transfer. In support of its request, Defendants rely on the venue selection clause contained in the Franchise Agreement by and between Jenny Craig International, Inc., and DMJ, Inc., which provides, in relevant part, as follows: "Any arbitration or litigation relating in any way to this Agreement shall be conducted in San Diego, California." Moreover, Defendants have advised the Court that in accordance with this venue selection clause, Jenny Craig Franchising, LLC, has commenced an action in the United State District Court for the Southern District of California, Civil Action No. 08cv0354-JM-BLM, arising out of and relating to the Franchise Agreement. Finally, Plaintiffs' have advised the Court that they have no objection to Defendants' request to transfer the instant action to the United States District Court for the Southern District of California for consolidation with Civil Action No. 08cv0354-JM-BLM.

The Court, having considered Defendants' instant request for transfer, being advised that Plaintiffs have consented to the requested transfer, and being otherwise fully advised in the premises, is of the opinion that Defendants' instant request is well-founded and should be granted.

A TRUE COPY, I HEREBY CERTIFY.
J. T. NOBLIN, CLERK
BY: ______
DEPUTY CLERK

ACCORDINGLY, it is hereby ORDERED that this action shall be TRANSFERRED to the United States District Court for the Southern District of California. Further, the Court hereby advises the Clerk of the United States District Court for the Southern District of California that the parties to this action have consented to the consolidation of this action with Civil Action No. 08cv0354-JM-BLM, presently pending in the Southern District of California.

SO ORDERED, this the 17th day of March, 2008.

UNITED STATES DISTRICT COURT JUDGE

AGREED AS TO SUBSTANCE AND FORM:

s/ Joseph Anthony Sclafani
Joseph Anthony Sclafani, Esq. (MSB No. 99670)
Brunini, Grantham, Grower & Hewes, PLLC
1400 Trustmark Building
248 East Capitol Street (39201)
Post Office Drawer 119
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Telephone: (601) 948-3101
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jsclafani@brunini.com
Counsel for Plaintiffs

s/ Sheryl Bey
Sheryl Bey, Esq. (MSB No. 9484)
Brad C. Moody, Esq. (MSB No. 101628)
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
4268 I-55 North
Meadowbrook Office Park
Jackson, Mississippi 39211
Telephone: (601) 351-2400
Facsimile: (601) 351-2424
sbey@bakerdonelson.com
bmoody@bakerdonelson.com
Counsel for Defendants

CJRA-P, CLOSED, LRA

U.S. District Court
Southern District of Mississippi (Jackson)
CIVIL DOCKET FOR CASE #: 3:08-cv-00112-HTW-LRA
Internal Use Only

Fusco et al v. Jenny Craig, Inc. et al
Assigned to: District Judge Henry T. Wingate
Referred to: Magistrate Judge Linda R. Anderson
Cause: 28:1332 Diversity-Notice of Removal

Date Filed: 02/22/2008
Date Terminated: 03/17/2008
Jury Demand: None
Nature of Suit: 196 Contract: Franchise
Jurisdiction: Diversity

Plaintiff

Jon P. Fusco represented by **Joseph Anthony Sclafani**
BRUNINI, GRANTHAM, GROWER & HEWES
P. O. Drawer 119
Jackson, MS 39205-0119
(601) 948-3101
Email: jsclafani@brunini.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Jo Anne Fusco represented by **Joseph Anthony Sclafani**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Ken Carter represented by **Joseph Anthony Sclafani**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Jenny Craig, Inc. represented by **Bradley C. Moody**
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC - Jackson
P. O. Box 14167
Jackson, MS 39236-4167

A TRUE COPY, I HEREBY CERTIFY.
J. T. NOBLIN, CLERK
DEPUTY CLERK

601/351-2400
Email: bmoody@bakerdonelson.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sheryl M. Bey
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
P. O. Box 14167
Jackson, MS 39236-4167
(601) 351-2400
Email: sbey@bakerdonelson.com
ATTORNEY TO BE NOTICED

Defendant

Jenny Craig International, Inc. represented by **Bradley C. Moody**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Sheryl M. Bey
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
02/22/2008	1	NOTICE OF REMOVAL by Jenny Craig, Inc., Jenny Craig International, Inc. from Madison Chancery Court, case number 2008-159-B. (Filing fee $ 350 receipt number 023886) (Attachments: # 1 Civil Cover Sheet, # 2 Lower Court Complaint)(THR) (Entered: 02/25/2008)
02/22/2008		(Court only) ***Set Mag. Judge Linda R. Anderson, Pending Flags (THR) (Entered: 02/25/2008)
02/28/2008	2	NOTICE of Hearing: Evidentiary Hearing set for 3/14/2008 09:30 AM in Courtroom 1 before District Judge Henry T. Wingate (TRS) (Entered: 02/28/2008)
03/07/2008	3	MEMORANDUM IN OPPOSITION re 1 *Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction* filed by Jenny Craig, Inc., Jenny Craig International, Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9 [1 of 2], # 11 Exhibit 9 [2 of 2], # 12 Exhibit 10, # 13 Exhibit B [1 of 3], # 14 Exhibit B [2 of 3], # 15 Exhibit B [3 of 3], # 16 Exhibit C) (Moody, Bradley) (Entered: 03/07/2008)
03/07/2008		DOCKET ANNOTATION as to #3: Document #3 is response to VERIFIED PETITION FOR TRO, PRELIMINARY INJUNCTION AND PREMANENT INJUNCTION contained in 1 NOTICE OF REMOVAL. (RRL) (Entered: 03/07/2008)

03/17/2008	4	CONSENT ORDER Transferring Civil Action to U.S. District Court for the Southern District of California. Signed by District Judge Henry T. Wingate on 3/17/08.(RRL) (Entered: 03/18/2008)
03/17/2008		(Court only) ***Civil Case Terminated. (RRL) (Entered: 03/18/2008)
03/18/2008		Remark: Certified copy of Consent Order Transferring Civil Action and Certified Copy of Docket sheet forwarded to: U.S. District Court, Southern District of California, 4290 Edward J. Schwartz Federal Bldg., 880 Front Street, San Diego, CA 92101-8900. (RRL) (Entered: 03/18/2008)

FILED
FEB 22 2008
J. T. NOBLIN, CLERK
BY ______ DEPUTY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JON P. FUSCO, JO ANNE FUSCO, and KEN CARTER — **PLAINTIFFS**

V. — **CIVIL ACTION NO.** 3:08cv113 HTW-LRA

JENNY CRAIG, INC. and JENNY CRAIG INTERNATIONAL, INC. — **DEFENDANTS**

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446, the Defendants, Jenny Craig, Inc. and Jenny Craig International, Inc.[1] (collectively "the Defendants") file this Notice of Removal of this action from the Chancery Court of Madison County, Mississippi, to the United States District Court for the Southern District of Mississippi, Jackson Division. In support of their Notice of Removal, the Defendants state as follows:

1. Plaintiffs Jon P. Fusco and Jo Anne Fusco ("Fusco plaintiffs") are owners of DMJ, Inc.,[2] which owned and operated Jenny Craig franchises in Mississippi and Tennessee until February 14, 2008. Plaintiff Ken Carter is a purported potential purchaser of the Jenny Craig franchises.

2. DMJ Inc.'s franchise agreements terminated on February 14, 2008, because of DMJ, Inc.'s failure to cure a number of defaults under its franchise agreements after receiving numerous warnings, as well as a formal notice of default on November 16, 2007, from Jenny Craig Franchising, LLC, an affiliate of the Defendants.

---

[1] Jenny Craig International, Inc. merged into Jenny Craig, Inc. in 2007, and is no longer a stand alone entity.

[2] DMJ, Inc. is not named as a plaintiff to this action.

3. On February 15, 2008, Jenny Craig Franchising notified the Fusco plaintiffs that because DMJ, Inc.'s franchise agreements terminated on February 14, 2008, in accordance with the November 16, 2007 Notice of Default, and that the Defendants would send Jenny Craig representatives to assume the operations of the Mississippi franchise on February 21, 2008.

4. On February 21, 2008, before Jenny Craig Franchising had entered the premises of the Mississippi franchise, the Plaintiffs filed their Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction in the Chancery Court for Madison County, Mississippi, seeking to enjoin the Defendants from seizing control of the Mississippi franchise. A copy of the Petition served on the Defendants is attached hereto as Exhibit "A".

GROUNDS FOR REMOVAL

5. The Fusco plaintiffs are residents of Tennessee, and Carter is an adult resident of Calgary, Alberta, Canada. Jenny Craig, Inc. is a Delaware corporation with its principal place of business in California.[3] Thus, complete diversity of citizenship exists between the parties.[4]

6. Furthermore, the amount in controversy exceeds the jurisdictional requisite amount inasmuch as the Plaintiffs seek injunctive relief to protect their purported interests in the Mississippi franchise, which they have valued in excess of $75,000.00. *See Franklin County Memorial Hosp. v. Horizon Mental Health Mgt.*, 2007 WL 781843, at *1 (S.D. Miss., March 13, 2007) (holding that "in the case of a plaintiff's request for injunctive relief, the amount in

[3] Prior to merging with Jenny Craig, Inc., Jenny Craig International was a California corporation with a principal place of business in California. Jenny Craig Franchising is a Delaware limited liability company, with its principal place of business in California, who sole member is Jenny Craig NA Franchising, Inc., a California Corporation, with its principal place of business in California. For purposes of determining whether there is diversity of citizenship pursuant to 28 U.S.C. § 1332, Jenny Craig Franchising's state of citizenship is California, the state in which its sole member is incorporated and has its principal place of business. *Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006)

[4] 28 U.S.C. § 1332(a)(3) provides this Court with subject matter jurisdiction since there is complete diversity between the Fusco plaintiffs and the Defendants, and since Carter is a citizen of a foreign state.

controversy would be the 'monetary value of the benefit that would flow to the plaintiff if the injunction were granted'").

7. Because complete diversity exists and because the amount in controversy is satisfied, subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332, making this removal proper. *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1446(a) because the United States District Court for the Southern District of Mississippi, Jackson Division, is the district in which the state court action was filed. *See* 28 U.S.C. § 104(b)(1).

9. The Defendants have today filed a copy of this Notice of Removal with the Clerk of the Chancery Court of Madison County, Mississippi, pursuant to 28 U.S.C. § 1446(d).

THIS the 22nd Day of February, 2008.

Respectfully submitted,

JENNY CRAIG, INC. and
JENNY CRAIG INTERNATIONAL, INC.

By: Brad Moody
Brad C. Moody (MS Bar. No. 101628)

OF COUNSEL:
Sheryl Bey (MSB #9484)
Brad C. Moody (MSB #101628)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
4268 I-55 North
Meadowbrook Office Park
Jackson, Mississippi 39211
Telephone: 601-351-2400
Facsimile: 601-351-2424

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically forwarded and sent via U.S. Mail, postage prepaid, a copy of the foregoing to the following:

John Brunini, Esq.
Joseph Anthony Sclafani, Esq.
Brunini, Grantham, Grower & Hewes, PLLC
1400 Trustmark Bldg., 248 East Capitol St. (39201)
P.O. Drawer 119
Jackson, MS 39205-0119

This the 22nd day of February, 2008.

By: ______________________
Brad C. Moody

JM BCM 561857 v2
0000000-000000 2/22/2008

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
FEB 22 2008
J. T. NOBLIN, CLERK
BY ______ DEPUTY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JON P. FUSCO, JO ANNE FUSCO,
and KEN CARTER **PLAINTIFFS**

V. **CIVIL ACTION NO.** 3:08cv112 HTW-LRA

JENNY CRAIG, INC. and
JENNY CRAIG INTERNATIONAL, INC. **DEFENDANTS**

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441 and 1446, the Defendants, Jenny Craig, Inc. and Jenny Craig International, Inc.[1] (collectively "the Defendants") file this Notice of Removal of this action from the Chancery Court of Madison County, Mississippi, to the United States District Court for the Southern District of Mississippi, Jackson Division. In support of their Notice of Removal, the Defendants state as follows:

1. Plaintiffs Jon P. Fusco and Jo Anne Fusco ("Fusco plaintiffs") are owners of DMJ, Inc.,[2] which owned and operated Jenny Craig franchises in Mississippi and Tennessee until February 14, 2008. Plaintiff Ken Carter is a purported potential purchaser of the Jenny Craig franchises.

2. DMJ Inc.'s franchise agreements terminated on February 14, 2008, because of DMJ, Inc.'s failure to cure a number of defaults under its franchise agreements after receiving numerous warnings, as well as a formal notice of default on November 16, 2007, from Jenny Craig Franchising, LLC, an affiliate of the Defendants.

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[1] Jenny Craig International, Inc. merged into Jenny Craig, Inc. in 2007, and is no longer a stand alone entity.

[2] DMJ, Inc. is not named as a plaintiff to this action.

3. On February 15, 2008, Jenny Craig Franchising notified the Fusco plaintiffs that because DMJ, Inc.'s franchise agreements terminated on February 14, 2008, in accordance with the November 16, 2007 Notice of Default, and that the Defendants would send Jenny Craig representatives to assume the operations of the Mississippi franchise on February 21, 2008.

4. On February 21, 2008, before Jenny Craig Franchising had entered the premises of the Mississippi franchise, the Plaintiffs filed their Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction in the Chancery Court for Madison County, Mississippi, seeking to enjoin the Defendants from seizing control of the Mississippi franchise. A copy of the Petition served on the Defendants is attached hereto as Exhibit "A".

GROUNDS FOR REMOVAL

5. The Fusco plaintiffs are residents of Tennessee, and Carter is an adult resident of Calgary, Alberta, Canada. Jenny Craig, Inc. is a Delaware corporation with its principal place of business in California.[3] Thus, complete diversity of citizenship exists between the parties.[4]

6. Furthermore, the amount in controversy exceeds the jurisdictional requisite amount inasmuch as the Plaintiffs seek injunctive relief to protect their purported interests in the Mississippi franchise, which they have valued in excess of $75,000.00. *See Franklin County Memorial Hosp. v. Horizon Mental Health Mgt.*, 2007 WL 781843, at *1 (S.D. Miss., March 13, 2007) (holding that "in the case of a plaintiff's request for injunctive relief, the amount in

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[4] 28 U.S.C. § 1332(a)(3) provides this Court with subject matter jurisdiction since there is complete diversity between the Fusco plaintiffs and the Defendants, and since Carter is a citizen of a foreign state.

JM BCM 561857 v2
0000000-000000 2/22/2008

controversy would be the 'monetary value of the benefit that would flow to the plaintiff if the injunction were granted'").

7. Because complete diversity exists and because the amount in controversy is satisfied, subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332, making this removal proper. *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1446(a) because the United States District Court for the Southern District of Mississippi, Jackson Division, is the district in which the state court action was filed. *See* 28 U.S.C. § 104(b)(1).

9. The Defendants have today filed a copy of this Notice of Removal with the Clerk of the Chancery Court of Madison County, Mississippi, pursuant to 28 U.S.C. § 1446(d).

THIS the 22nd Day of February, 2008.

Respectfully submitted,

JENNY CRAIG, INC. and JENNY CRAIG INTERNATIONAL, INC.

By: Brad Moody
Brad C. Moody (MS Bar. No. 101628)

OF COUNSEL:
Sheryl Bey (MSB #9484)
Brad C. Moody (MSB #101628)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
4268 I-55 North
Meadowbrook Office Park
Jackson, Mississippi 39211
Telephone: 601-351-2400
Facsimile: 601-351-2424

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically forwarded and sent via U.S. Mail, postage prepaid, a copy of the foregoing to the following:

John Brunini, Esq.
Joseph Anthony Sclafani, Esq.
Brunini, Grantham, Grower & Hewes, PLLC
1400 Trustmark Bldg., 248 East Capitol St. (39201)
P.O. Drawer 119
Jackson, MS 39205-0119

This the 22nd day of February, 2008.

By: ______________________
Brad C. Moody

JM BCM 561857 v2
0000000-000000 2/22/2008

JS44 (Rev. 11/04)

CIVIL COVER SHEET

3:08cv113 HTW-LRA

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

JON P. FUSCO, JO ANNE FUSCO, and KEN CARTER

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Memphis Shelby County TN
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
John Brunini, Esq.
Joseph Anthony Sclafani, Esq.
Brunini, Grantham, Grower & Hewes, PLLC
1400 Trustmark Bldg., 248 East Capitol St. (39201)
P.O. Drawer 119
Jackson, MS 39205-0119
(601) 948-3101

DEFENDANTS

JENNY CRAIG, INC. and JENNY CRAIG INTERNATIONAL, INC.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT California
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

ATTORNEYS (IF KNOWN)
Sheryl Bey, Esq.
Brad C. Moody, Esq.
BAKER, DONELSON, BEARMAN & CALDWELL
4268 I-55 North, Meadowbrook Office Park (39211)
Post Office Box 14167
Jackson, Mississippi 39236-4167
601-351-2400

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
FEB 22 2008
J. T. NOBLIN, CLERK
BY ____ DEPUTY

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizens of This State	☐ 1	☐ 1	Incorporated or Principal Place Of Business in This State	☐ 4	☐ 4
Citizens of Another State	☒ 2	☐ 2	Incorporated and Principal Place Of Business in Another State	☐ 5	☒ 5
Citizens or Subject of a Foreign County	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- 190 Other Contract
- ☐ 195 Contract Product Liability
- ☒ 196 Franchise

TORTS — PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury – Med Malpractice
- ☐ 365 Personal Injury – Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS – Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/SAT TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities – Employment
- ☐ 446 Amer. w/Disabilities – Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

HABEAS CORPUS:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

V. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (Specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING (DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY:
28 U.S.C. § 1332(a)(3)
Brief Description of Cause:
Petition for Temporary Restraining Order and Permanent Injunctive Relief

VII. REQUESTED IN COMPLAINT

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

Check YES only if demanded in complaint:
JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions)

JUDGE ____ DOCKET NUMBER ____

DATE February 22, 2008

SIGNATURE OF ATTORNEY OF RECORD
Brad Moody
BRAD C. MOODY (101628)

FOR OFFICE USE ONLY
RECEIPT # 1023886 AMOUNT #350.00 APPLYING IFP ____ JUDGE ____ MAG. JUDGE ____

IN THE CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

JON P. FUSCO, JO ANNE FUSCO, and KEN CARTER — **PLAINTIFFS**

vs. — NO. 2008-159-B

JENNY CRAIG, INC., and JENNY CRAIG INTERNATIONAL, INC. — **DEFENDANTS**

VERIFIED PETITION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

COMES NOW Plaintiffs, Jon P. Fusco, Jo Anne Fusco, and Ken Carter, ("Plaintiffs") by and through counsel, and bring this Verified Petition for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction ("Verified Petition") against Defendants Jenny Craig, Inc. and Jenny Craig International, Inc., ("Defendants" or "Jenny Craig"), and in support thereof, will show unto the Court the following:

PARTIES

1. Plaintiffs, Jon P. Fusco and Jo Anne Fusco, are adult residents of Memphis, Shelby County, Tennessee. Plaintiffs are the owners and operators of a "Jenny Craig" franchise located at 900 E. County Line Road, Ridgeland, which is located in Madison County, Mississippi.

2. Plaintiff, Ken Carter, is an adult resident of Calgary, Alberta, Canada.

3. Defendants, Jenny Craig, Inc. and Jenny Craig International, Inc., are California corporations doing business in the State of Mississippi and may be served through their registered agent, C T Corporation System, 118 North Congress Street, Jackson, Mississippi.

FILED THIS DATE FEB 21 2008 ARTHUR JOHNSTON, CHANCERY CLERK BY [signature] D.C.

EXHIBIT "A"

JURISDICTION AND VENUE

4. Jurisdiction over this matter is proper in this Court, pursuant to Section 159 of the Mississippi Constitution (1890) and Section 9-5-81 of the Mississippi Code.

5. Venue is proper in this Court, pursuant to Section 11-5-1 of the Mississippi Code, as the business which is the subject of this Petition is located in Madison County, Mississippi.

FACTS

6. Plaintiffs Jon P. Fusco and Jo Anne Fusco are the principals of DMJ, Inc., a franchisee of Defendant Jenny Craig.

7. DMJ, Inc. and Jenny Craig entered into the following agreements effective April 1, 2001:

a. Area Development Agreement for Jackson, Mississippi ;

b. Franchise Agreement number 8155 for the Jackson Mississippi Centre;

c. Area Development Agreement for Memphis, Tennessee; and

d. Franchise Agreement number 8072 for the Memphis, Tennessee Centre.

8. On November 16, 2007, Jenny Craig served DMJ, Inc. with notice of default under the Agreements and gave DMJ, Inc. until February 14, 2008 to cure the instances of default or secure a new owner for the Centres.

9. On February 8, 2008, the Fuscos notified Jenny Craig that they had entered into an agreement with Plaintiff Ken Carter to transfer ownership of the Memphis and Jackson Centres but that the agreement could not be consummated until Carter returned to Calgary, Alberta from Australia.

10. Plaintiff Ken Carter is a Jenny Craig franchisee with Centres throughout Canada and Australia.

11. On February 8, 2008, Doug Fisher, Jenny Craig Vice President of Franchise Operations and Development, called Jon P. Fusco and acknowledged that he had received information regarding the agreement from Ken Carter's attorney.

12. Doug Fisher said he would have a letter drafted that would extend the termination date until Ken Carter returned from Australia and was able to complete the transaction.

13. In a separate conversation, Fisher also told Ken Carter that he would extend the termination date until Ken Carter returned from Australia and was able to complete the transaction.

14. In reliance on Fisher's assurances that they could move forward with their plans, the Fuscos and Carter continued to work towards consummating the deal and transitioning the Centres to Carter.

15. On February 15, 2008, the Fuscos received a letter from Fisher purporting to address "post-termination rights" and stating that Jenny Craig would "step in and start operating the Centres on Wednesday or Thursday of next week."

16. On February 20, 2008, Counsel for Jenny Craig, John R. Baer, Esq., advised Counsel for the Fuscos, Charmiane G. Claxton, Esq., that "Jenny Craig personnel will be visiting . . . the Jackson Centre on Friday, February 22, 2008 to take over its operations." (A copy of this email is attached as Exhibit A.) Additionally, this communication advised that a Jenny Craig employee "will visit the Jackson Centre close to closing time [on Thursday, February 21, 2008] to take an inventory." The communication concluded by stating "We sincerely hope that DMJ

will allow those inventories to be taken and abide by its contractual obligations to turn over the operations of those facilities to Jenny Craig personnel when they arrive."

17. Plaintiffs have made repeated demands to the Defendants to honor their assurances and permit the Plaintiffs to move forward with the orderly transition.

18. The Defendants refuse to honor their agreement to permit the Plaintiffs to consummate their transaction and insist on entering the Centres and disrupting operations. Such an entry and disruption would irreparably harm the Plaintiffs by causing the departure of valuable employees and the loss of customers which would lead to a loss of income, growth opportunities, and goodwill.

19. On February 20, 2008 ~~[illegible]~~, the Chancery Court of Tennessee for the Thirteenth Judicial District at Memphis, Shelby County, granted Plaintiffs' request for entry of a temporary restraining order prohibiting Defendants from entering the Memphis Centres. (A copy of this Order is attached as Exhibit B.)

COUNT 1: APPLICATION FOR TERMPORARY RESTRAINING ORDER, PRELIMIARY INJUNCTION AND PERMANENT INJUNCTION

20. Plaintiffs incorporate by reference into this Count all allegations contained in Paragraphs 1-19.

21. In accordance with Mississippi Rule of Civil Procedure 65(b), Plaintiffs respectfully request entry of a temporary restraining order, not to exceed ten (10) days, against the Defendants.

22. Plaintiffs respectfully submit that the Court should grant Plaintiffs' request for a temporary restraining order and preliminary injunction for the following reasons:

(a) Plaintiffs are substantially likely to prevail on the merits of their claim.

(b) The entry such orders are necessary to prevent irreparable harm. Specifically, if Defendants enter Plaintiffs' business, as threatened, on February 21, 2008 and February 22, 2008, such entry will irreparably disrupt Plaintiffs' business operation causing the loss of goodwill, income, growth opportunity, employee base and customers. It is impossible to quantify the damages represented by such losses.

(c) The threatened harm to Plaintiffs' business operations substantially outweighs any theoretical harm that Defendants might suffer.

(d) The entry of this request is consistent with public policy and in the interest of the public.

23. In accordance with the requirements of Mississippi Rule of Civil Procedure 65(c), Plaintiffs stand ready to post reasonable bond.

24. Further, upon notice and hearing, to be conducted within ten (10) days, Plaintiffs, for the purpose of preventing immediate and irreparable harm, loss and damages, would request that the temporary restraining order be converted to a preliminary injunction.

25. Plaintiffs' respectfully submit that they have met their burden under Mississippi Rule of Civil Procedure 65, and the Court should immediately enter a temporary restraining order precluding Defendants, their representatives, employees, contractors, agents and assigns from entering the Jackson Centres and disrupting its operations.

REQUEST FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Jon P. Fusco, Jo Anne Fusco, and Ken Carter, respectfully request all relief as referenced in this Verified Petition, including but not limited to, the following:

(a) That this Honorable Court issues a temporary restraining order as to Defendants.

(b) Upon a hearing, pursuant to Rule 65, to be conducted within ten (10) days of the issuance of the temporary restraining order, that the Court make such temporary restraining order permanent and grant temporary injunctive relief or, in the alternative, permanent injunctive relief so as to protect the Plaintiffs from the actions of Defendants.

(c) That Plaintiffs be granted leave to amend this Verified Petition as evidence and justice may so require.

This the 21st day of February, 2008.

Respectfully submitted,

JON P. FUSCO
JO ANNE FUSCO
KEN CARTER
Plaintiffs

By: ______________________
One of Its Attorneys

OF COUNSEL:

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NOTICE SETTING OF MOTION HEARING: PRELIMINARY INJUNCTION/TRO

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JON P. FUSCO, et al	**PLAINTIFF**
V.	**CIVIL ACTION NO. 3:08CV112WS**
JENNY CRAIG, INC. et al	**DEFENDANT**

TAKE NOTICE THAT THIS EVIDENTIARY HEARING, IN THE ABOVE CAPTIONED CAUSE IS HEREBY SET FOR ***FRIDAY, MARCH 14 2008 AT 9:30 A.M.*** BEFORE THE HONORABLE JUDGE HENRY T. WINGATE*

***PLACE:**

James O. Eastland U. S. Courthouse
Courtroom No. 1 Fourth Floor
245 E. Capitol Street Suite 109
Jackson, MS 39201

TYPE OF PROCEEDING	***DATE AND TIME:**
Motion Hearing: Injunction/TRO	**Friday, March 14, 2008 at 9:30 A.M.**

Should you have questions regarding this notice, you may contact the undersigned at 965-4042.

HON. J. T. NOBLIN, CLERK

DATED: February 28, 2008

s/ Twana Summers
Twana R. Summers, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

JON P. FUSCO, JO ANNE FUSCO, and KEN CARTER — **PLAINTIFFS**

V. — **CIVIL ACTION NO. 3:08CV112-HTW-LRA**

JENNY CRAIG, INC. and JENNY CRAIG INTERNATIONAL, INC. — **DEFENDANTS**

OPPOSITION TO VERIFIED PETITION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

Defendants Jenny Craig, Inc. and Jenny Craig International, Inc. (collectively "the Defendants") respond to the Verified Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction ("the Petition") filed by Jon P. Fusco and Jo Anne Fusco ("Fusco Plaintiffs") and Ken Carter as follows:

I. INTRODUCTION

The Plaintiffs filed the present action to prevent the Defendants from assuming control over the operations of a Jenny Craig weight loss centre located in Ridgeland, Mississippi, after the termination of a franchise agreement between Jenny Craig Franchising, LLC ("Jenny Craig") and DMJ, a corporation of which the Fusco Plaintiffs are shareholders. After the termination of the franchise agreement, Jenny Craig properly notified DMJ that it would take control of the Ridgeland Centre as provided for under the franchise agreement. Instead of relinquishing control of its franchise rights, the Fuscos (not DMJ) rushed into court to obtain a temporary restraining order while claiming that a Jenny Craig representative orally agreed to extend the termination date.

This Court should dismiss the Plaintiffs' Petition because all of the Plaintiffs lack standing to bring this action. Alternatively, this case should be transferred to the district court in

California in accordance with the forum-selection clause agreed to by the parties to the franchise agreement. However, if this Court considers the Petition on its merits, the Court should deny the Plaintiffs' requested relief because the Plaintiffs have insufficient proof to satisfy their heavy burden to obtain injunctive relief.

II. FACTUAL BACKGROUND

On or about April 23, 2001, DMJ, a corporation of which the Fusco Plaintiffs are shareholders, entered into franchise agreements with Jenny Craig International, which granted rights to DMJ to open franchise locations, referred to as Jenny Craig Centres, in Ridgeland, Mississippi and Memphis, Tennessee.[1] During May 2007, Jenny Craig began investigating DMJ's failure to perform certain obligations under the franchise agreement. As a result of Jenny Craig's investigation, Doug Fisher, Vice President of Franchise Operations & Development for Jenny Craig, sent a letter to Jon Fusco on May 7, 2007, outlining the following franchise issues that DMJ needed to address:

> (a) the need to completely refurbish the Jackson centre;
> (b) the need to update the Memphis centre with a graphics package;
> (c) the opening of an additional centre in Memphis to take advantage of opportunities in that market;
> (d) the need to provide P&L statements in the standardized format used by JCF; and
> (e) the need to submit P&L statements that were due at the time, including the full year 2006 and January through April 2007 statements.

See Affidavit of Doug Fisher at ¶4 (attached hereto as Exhibit "A").

The problems with DMJ management of its franchise locations worsened on or about July 19, 2007, when DMJ closed the Mississippi location without notifying Jenny Craig, as required by the franchise agreement. *Id.* at ¶6. DMJ initially represented that the reason for the

[1] Subsequent to the execution of the subject franchise agreements, Jenny Craig International, Inc. transferred its rights under the franchise agreements to Jenny Craig Franchising, LLC ("Jenny Craig"), which is not named as a defendant in this action. *See* Affidavit of Doug Fisher at ¶3 (attached hereto as Exhibit "A").

closure was due to a freezer problem that prevented it from providing food to its customers. *Id.* After further investigation, Jenny Craig learned that the location was closed because the Mississippi State Tax Commission issued a lien on the Mississippi property for failure to pay sales taxes. *Id.* At some point, the Mississippi location re-opened.

By November 2007, DMJ had not cured any of the issues outlined in Mr. Fisher's May 7, 2007 letter. *Id.* at ¶9. In accordance with the franchise agreement, on November 16, 2007, Mr. Fisher sent a Default Notice to DMJ notifying that DMJ was in default under the franchise agreement. *Id.* The Default Notice provided DMJ with ninety (90) days to cure all defaults, or otherwise, the franchise agreement would terminate on February 14, 2008, without further notice. *Id.*

On December 7, 2007, Mr. Fisher sent another letter to DMJ noting that Jenny Craig had not received any response from DMJ and further noting that since DMJ failed to register and attend Jenny Craig's annual conference, one of the defaults that had to be cured pursuant to the November 16, 2007 letter, DMJ no longer had the right to cure. *Id.* at ¶10. The letter further explained that DMJ's options were now limited to transferring the agreements to a third party, or to allow Jenny Craig to take over pursuant to the post-termination provisions in the franchise agreements. *Id.*

On or about the second week of January 2008 Mr. Fusco and Mr. Fisher had a phone conversation whereby Mr. Fusco informed Mr. Fisher that he was talking to the Plaintiff, Ken Carter, a Jenny Craig franchisee in Australia and Canada, about Mr. Carter purchasing DMJ's Centres. At no time did Mr. Fisher tell Mr. Fusco that the termination deadline of February 14, 2008, would be extended to accommodate a transaction between Mr. Fusco and any third party, including Mr. Carter. *Id.* at ¶11. In fact, section 20 of the franchise agreement requires that any extension of the termination deadline would have to be in writing and signed by both parties. *See* Franchise Agreement at §20 (attached hereto as Exhibit "B").

On January 24, 2008, Mr. Fisher sent DMJ a letter reiterating that the franchise agreements would terminate on February 14, 2008, and explaining that Jenny Craig needed to begin the process to transition the Centres from DMJ's control to Jenny Craig's control. The letter requested information on many different agreements and arrangements between DMJ and its customers, suppliers, and employees, necessary to help Jenny Craig step in to assume control of operations of the Mississippi and Memphis Centres upon termination. *Id.* at ¶12. The letter requested that the information be provided by February 1, 2008, and also outlined a transition plan, including Jenny Craig's representatives coming to the Centres on February 11, 2008, to take inventory and get ready for the transition to the Centres being operated by Jenny Craig. *Id.* at ¶12.

On or about February 8, 2008, Mr. Fisher had a phone conversation with Mr. Fusco indicating that JCF had received a draft Asset Purchase Agreement ("APA") from Mr. Fusco's Lawyer. Mr. Fisher told Mr. Fusco that Jenny Craig would begin reviewing the draft but that it needed the fully executed document before the termination date of February 14, 2008. Mr. Fisher indicated that if Jenny Craig received the fully executed document by February 13, 2008, it would take time to review the offer and determine whether Jenny Craig wanted to exercise its Right of First Refusal under the franchise agreements. Mr. Fisher also told Mr. Fusco that if Jenny Craig did not exercise its Right of First Refusal and if Mr. Fusco wanted to proceed with the transfer, then Jenny Craig would allow Mr. Fusco and Mr. Carter time to see if they could come to some agreement. Pursuant to sections 13.1 and 13.2 of the franchise agreement, the transfer would be subject to Jenny Craig's approval. Mr. Fisher previously discussed this requirement with both Mr. Fusco and Mr. Carter. Mr. Fisher indicated that he did not know what form of communication or document they would need to put in place that would acknowledge the time period after the February 14th while Jenny Craig considered its Right of First Refusal. But, this was all conditioned on the requirement of receiving a fully executed document by February 13, 2008. *Id.* at ¶13.

On or about February 8, 2008, Mr. Fisher had another phone conversation with Mr. Carter and told him in no uncertain terms that Jenny Craig must have a fully executed Asset Purchase Agreement before February 14, 2008, in order for Jenny Craig to determine whether it would exercise its Right of First Refusal. *Id.* at ¶14. On February 13, 2008, Mr. Fisher sent an email to Mr. Fusco's attorney stating that Jenny Craig needed a fully executed Asset Purchase Agreement that same day because the franchise agreement was to terminate on February 14, 2008. *Id.* at ¶15.

On or about February 13, 2008, Mr. Fisher had a phone conversation with Mrs. Jo Ann Fusco. Mr. Fisher clearly stated that Jenny Craig needed the fully executed agreement no later than February 13, 2008. She was very angry and said she was not aware of that requirement because she had been out of town for the previous few days. Mr. Fisher said that her husband, Mr. Fusco, and their attorney were fully aware of that requirement based on the phone conversation with Mr. Fusco on February 8, 2008, and e-mail to the Fusco's attorney earlier that same day. *Id.* at ¶16.

Jenny Craig never received a fully executed Asset Purchase Agreement. Rather, Mr. Fusco sent a draft Asset Purchase Agreement, which omitted most of the pertinent financial information. Specifically, among the omitted information were the names of the seller and buyer, and the financial schedules that would contain information about which assets were being purchased, the liens attached to those assets and the liabilities being assumed. *Id.* at ¶17.

Because DMJ failed to submit a fully executed Asset Purchase Agreement by February 13, 2008, Mr. Fisher sent a post termination letter to DMJ on February 15, 2008. In that letter Mr. Fisher notified DMJ that the franchise agreement terminated on February 14, 2008. Mr. Fisher also offered DMJ $300,000 (less amounts owed to JCF) for the fair market value of the fittings and equipment for the Centres pursuant to the franchise agreement. This offer would remain open until February 20, 2008. *Id.* at ¶19.

Additionally, the February 15, 2008 letter informed DMJ that Jenny Craig would be taking control of the operations of the Centres during the next week, which included sending personnel to the Centres to take inventory, change the locks, and ensure that staff members are paid and working, and that clients are serviced in order to continue operations in both Centres. Upon taking control of the Centres, Jenny Craig would continue to operate the business without interruption. *Id.* at ¶20.

On February 21, 2008, the Plaintiffs filed their Petition with the Chancery Court of Madison County to prevent Jenny Craig from assuming control of the Jackson Centre. The next day, the Defendants removed the action to federal court.

III. SUMMARY OF GROUNDS FOR DENYING PETITION FOR TRO

For the reasons set forth more fully below, this Court should dismiss this case because all of the Plaintiffs lack standing to bring this action. Alternatively, this case should be transferred to the district court in California in accordance with the forum-selection clause agreed to by the parties. However, if this Court considers the Petition on its merits, the Court should deny the Plaintiffs' requested relief because they cannot satisfy their heavy burden to obtain injunctive relief. Specifically, Plaintiffs did not, and cannot, establish (1) they are likely to prevail on their claim that the termination date was extended, and (2) they will suffer irreparable harm.

IV. ARGUMENT

A. All of the Plaintiffs Lack Standing to Pursue this Action.

As noted above, DMJ, not the Fusco Plaintiffs, entered into the franchise agreement with Jenny Craig. As the shareholders of DMJ, the Fusco Plaintiffs do not have standing to bring an individual action to redress an alleged wrong against DMJ. As stated by the Mississippi Court of Appeals

> an action to redress injuries to a corporation … cannot be maintained by a stockholder in his own name, but must be brought by the corporation because the action belongs to the corporation and not the individual stockholder whose rights are merely derivative. The rule applies even though the complaining stockholder owns all or substantially all of the stock in the corporation.

Durham v. University of Mississippi, 966 So. 2d 832, 835 (Miss. Ct. App. 2007) (quoting *Bruno v. Southeastern Servs. Inc.*, 385 So. 2d 620, 622 (Miss. 1980)).

The Fusco Plaintiffs are only shareholders of DMJ, not parties to the franchise agreement. As a result, they cannot maintain this action. Furthermore, Ken Carter, as a purported potential buyer of DMJ's former franchise interests, also does not have standing to pursue this action. Carter is a complete stranger to the franchise agreement between DMJ and Jenny Craig. As such, he does not have standing to pursue the present action arising from the franchise agreement. *Cottingham v. Gen. Motors Corp.*, 119 F.3d 373, 379 (5th Cir. 1997) (holding non-party to a contract has no standing to sue for damages for breach of contract). Under Mississippi law, only DMJ, Inc. has standing to pursue the present action. Since DMJ is not a named plaintiff,[2] the Petition should be dismissed.

[2] The likely reason that this action is not being pursued by DMJ is because it is not registered to do business in Mississippi and would be prohibited from bringing suit under Miss. Code Ann. §79-4-15.02.

B. Mississippi Is Not the Proper Forum for This Action.

The franchise agreement between DMJ and Jenny Craig provides "[a]ny arbitration or litigation relating in any way to this Agreement shall be conducted in San Diego, California." *See* Franchise Agreement at ¶ 22.3. The agreement further states that "Franchisee [DMJ] hereby irrevocably waives … any objection that Franchisee may now or hereafter have to the laying of venue in San Diego, California, and any claim that San Diego, California, is an inconvenient forum." *Id.* The foregoing provision is a valid forum selection clause to which DMJ agreed. Notwithstanding the Plaintiffs' lack of standing, any action concerning the franchise agreement must be brought in a court in San Diego, California.

As stated by the Fifth Circuit, "[a] forum selection provision in a written contract is *prima facie* valid and enforceable unless the opposing party shows that enforcement would be unreasonable." *Haynsworth v. The Corporation*, 121 F.3d 946, 963 (5th Cir. 1997). The party opposing the forum-selection clause bears a heavy burden and must demonstrate the following by a clear showing:

> (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching;
> (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum;
> (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or
> (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

Haynsworth, 121 F.3d at 963.

In the present case, DMJ and Jenny Craig agreed to a valid forum-selection clause that requires all litigation to be filed in San Diego, California. And there is no evidence (much less clear and convincing evidence) that the clause is unenforceable under the *Haynsworth* criteria. Mississippi is not the proper forum for this action. As a result, if it is not dismissed, this case should be transferred to the United States District Court for the Southern District of California where Jenny Craig Franchising, LLC has filed a complaint seeking injunctive relief for DMJ, Inc.'s breach of the franchise agreement. *See* Complaint styled as *Jenny Craig Franchising, LLC v. DMJ, Inc.*, Civil Action No. 2008CV0354-JM-BLM (attached hereto as Exhibit "C").

C. The Plaintiffs Cannot Satisfy Their Burden to Obtain a Temporary Restraining Order.

Under Mississippi law, the party requesting temporary injunctive relief must show the following:

(1) a substantial likelihood that plaintiff will prevail on the merits,

(2) a substantial threat that irreparable injury will result if the injunction is not granted,

(3) that the threatened injury outweighs the threatened harm to defendant, and

(4) that granting the preliminary injunction will not disserve the public interest.

Phillips v. Oxford Separate Mun. Sch. Dist., 314 F. Supp. 2d 643, 645 (N.D. Miss. 2003).

"A preliminary injunction is an extraordinary remedy which should be granted only when a movant clearly carries the burden of persuasion on all four factors...." *Hilliard v. BellSouth Medical Assistance Plan*, 918 F. Supp. 1016, 1027 (S.D. Miss. 1995). "The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Hilliard*, 918 F. Supp. at 1027.

1. It Is Unlikely The Plaintiffs Will Prevail On The Merits Of Their Request For Injunctive Relief.

The crux of the Plaintiffs' Petition is that the franchise agreement between DMJ and Jenny Craig did not terminate on February 14, 2008, because "Doug Fisher said he would have a letter drafted that would extend the termination date until Ken Carter returned from Australia and was able to complete the transaction." *See* Petition at ¶12. However, the only evidence that supports the Plaintiffs' version of the facts are their own statements.

The Plaintiffs contend that Mr. Fisher verbally agreed to extend the termination deadline despite the fact that the franchise agreement does not permit verbal changes to the agreement. The franchise agreement requires any changes to be in writing and signed by both DMJ and Jenny Craig. *See* Franchise Agreement at §20. Mr. Fisher states in his affidavit that he never told the Fusco Plaintiffs that Jenny Craig would extend the termination deadline. Moreover, all of the correspondence exchanged from November 16, 2007, to February 15, 2008, between the Fusco Plaintiffs and Mr. Fisher states that DMJ had to provide Jenny Craig with a fully executed version of any purchase agreement between DMJ and Plaintiff Carter by February 13, 2008, to avoid termination of DMJ's franchise agreement. *See* Fisher Affidavit at ¶13. DMJ only provided Jenny Craig with a draft of the proposed purchase agreement that omitted almost all of the pertinent financial information that Jenny Craig needed to evaluate its Right of First Refusal under the franchise agreement. *Id.* at ¶17. As a result, the franchise agreement terminated on February 14, 2008.

Even if Jenny Craig received a fully executed Asset Purchase Agreement, any proposed transfer is subject to Jenny Craig's approval under sections 13.1 and 13.2 of the franchise agreement. Jenny Craig has several options once DMJ presents Jenny Craig with a fully executed Asset Purchase Agreement: (1) exercise its Right of First Refusal; (2) allow DMJ to transfer rights to a third party; or (3) not approve the terms of the proposed transfer. If Jenny Craig Franchising exercises the third option, it then has the option to purchase the fittings and equipment at fair market value under section 15.4 of the franchise agreement. Even if Mr. Fisher extended the termination deadline, and Jenny Craig maintains that no such extension occurred, it does not mean that DMJ would be able to transfer the franchise centres to Mr. Carter, or any other third party since Jenny Craig has the right to approve such a transfer. Providing a fully executed Asset Purchase Agreement is only the first step towards DMJ's ability to consummate a deal with Mr. Carter and transfer the rights to the franchise centres. Therefore, even if the Franchise Agreement was not terminated on February 14, Plaintiffs cannot establish DMJ has a right to transfer its assets unless and until it demonstrates that Jenny Craig has approved the terms of an asset purchase agreement. Jenny Craig has not done so. In fact, DMJ has not yet even provided a signed asset purchase agreement to Jenny Craig.

2. The Plaintiffs Cannot Prove Irreparable Harm.

The Plaintiffs also cannot satisfy the second requirement to obtain a temporary restraining order because they cannot prove they will be irreparably harmed. The Plaintiffs assert that "if Defendants enter Plaintiffs' business, as threatened … such entry will irreparably disrupt Plaintiffs' business operation causing the loss of goodwill, income, growth opportunity, employee base and customers." *See* Petition at 5. The Plaintiffs, however, have no proof to substantiate this claim.

In support of their claim, the Plaintiffs merely offer a conclusory statement that by assuming control of the operations Jenny Craig will somehow disrupt business at the Jackson Centre. To the contrary, Jenny Craig intends to continue operations of the Mississippi franchise to ensure that the needs of Jenny Craig's customers are met. As set forth in Mr. Fisher's Affidavit, Jenny Craig is prepared to send personnel to the Jackson Centre to ensure a seamless transition in management. *See* Fisher Affidavit at ¶20. As Mr. Fisher states, Jenny Craig would "ensure that staff members are paid and working, and that clients are serviced in order to continue operations in both centres." *Id.* Mr. Fisher attests that Jenny Craig would continue to operate the business without interruption. *Id.* Clearly, Jenny Craig has every incentive not to disrupt business operations inasmuch as a disruption might damage Jenny Craig's reputation and cause customers to seek other weigh loss programs. The Plaintiffs have no proof otherwise.

Their conclusory statement that somehow a change in the management of the Jackson Centre would disrupt business is unfounded. As a result, they cannot meet their heavy burden to prove irreparable harm.

3. The Threatened Harm to Jenny Craig Outweighs Any Theoretical Harm Posited by the Plaintiffs.

The Plaintiffs cannot prove that they will suffer any harm if Jenny Craig assumes control of the Jackson Centre. Jenny Craig, however, will suffer harm if the Mississippi Centre continues to be operated by DMJ. DMJ has proven numerous times that it is not capable of managing the Jackson Centre. Last summer, the Jackson Centre was closed by the Mississippi State Tax Commission because DMJ had not paid sales tax. *See* Fisher Affidavit at ¶6. That incident seriously undermines any confidence in DMJ's ability to manage the Jackson Centre, especially since Jon Fusco misrepresented that the Centre closed because of a freezer problem. Not to mention that DMJ never cured any of the defaults under the franchise agreement that prompted the termination of the agreement. Furthermore, as noted in Mr. Fisher's Affidavit, DMJ owes Jenny Craig approximately $100,000 for overdue payments for food and royalties and $5,000 to the Jackson Centre landlord in overdue rent. *Id.* at 21. Clearly, DMJ is struggling to meet many of its primary financial obligations. All of this evidence proves that there is a significant threat that the quality of services provided at the Jackson Centre will diminish with a cash-strapped DMJ in control. There is a substantial likelihood that upon learning of the termination of the franchise agreement and of DMJ's struggles, the landlord for the Mississippi franchise property may seek out new tenants, the employees of the franchise may look for new jobs, and existing customers may look for another weight loss program because of uncertainty as to whether the Jackson Centre will continue to serve their needs.

Moreover, Jenny Craig and its franchisees are subject to various orders and regulations of the Federal Trade Commission. For instance, pursuant to a February 19, 1998 FTC Order ("Order"), Jenny Craig is responsible for monitoring its franchises to ensure compliance with the Order.[3] DMJ's requested relief would prevent Jenny Craig from conducting its oversight to ensure compliance with the Order. Additionally, DMJ is currently using Jenny Craig's trademarks without a license since its license terminated along with the franchise agreement on February 14, 2008.

DMJ cannot prove any measurable harm it would suffer if Jenny Craig assumes control of the operations of the Jackson Centre since DMJ's franchise agreement has terminated. Clearly, there is a greater threat of harm to Jenny Craig if injunctive relief is granted. As a result, DMJ's request for injunctive relief should be denied.

4. The Plaintiffs Cannot Establish That the Issuance of An Injunction Is In the Best Interest of the Public.

As noted above, Jenny Craig has the greatest incentive at this point to continue the operations at the Mississippi Centre that provides services to customers. DMJ's noted struggles in operating the Jackson Centre seriously undermines confidence in their ability to continue operations. It is likely that DMJ will cause a loss in confidence in the Jackson Centre by the property landlord, employees, and customers. It is in the best interest of the public to allow Jenny Craig to exercise its rights upon the franchise agreement to assume control of the operations so as to ensure continued service at the Jackson Centre.

[3] A copy of the Federal Trade Commission's Order is attached as Exhibit D to the Franchise Agreement. The relevant provisions are found at Section V of the Order.

CONCLUSION

The Court should dismiss this action because the Plaintiffs lack standing to pursue their requested relief. Alternatively, the Court should transfer this action to the federal district court in San Diego, California, where a similar action filed by Jenny Craig Franchising, LLC is pending. If the Court considers the Petition on its merits, the Court should deny the Plaintiffs' requested relief because the Plaintiffs have not met their heavy burden to obtain a temporary restraining order.

WHEREFORE, PREMISES CONSIDERED, the Defendants respectfully request that the Plaintiffs' Petition for a Temporary Restraining Order be denied.

This the 7th day of March, 2008.

Respectfully submitted,

JENNY CRAIG, INC. and
JENNY CRAIG INTERNATIONAL, INC.

By: s/Brad C. Moody
Brad C. Moody

OF COUNSEL:
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CERTIFICATE OF SERVICE

I, Brad C. Moody, do hereby certify that on this date I electronically filed the foregoing with the Clerk of this Court using the ECF system which will send notification of the filing to all counsel as listed below:

John Brunini, Esq.
Joseph Anthony Sclafani, Esq.
Brunini, Grantham, Grower & Hewes, PLLC
1400 Trustmark Bldg., 248 East Capitol St. (39201)
P.O. Drawer 119
Jackson, MS 39205-0119

This the 7th day of March, 2008.

By: s/*Brad C. Moody*
Brad C. Moody

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JON P. FUSCO, JO ANNE FUSCO,
and KEN CARTER PLAINTIFFS

V. CIVIL ACTION NO. 3:08CV112-HTW-LRA

JENNY CRAIG, INC. and
JENNY CRAIG INTERNATIONAL, INC. DEFENDANTS

AFFIDAVIT OF DOUG FISHER

I, Douglas Fisher, declare as follows:

1. I am employed as the Vice President of Franchise Operations & Development at Jenny Craig, Inc. ("Jenny Craig"). I have personal knowledge of the following and if called as a witness, I could and would competently testify thereto.

2. I have been employed by Jenny Craig since June 2002. In my current position, I am responsible for providing support to current franchise owners and expanding into new franchise markets for Jenny Craig Franchising, LLC ("JCF"). Currently there are 216 franchise centres in North America, Australia and New Zealand.

3. DMJ, Inc., ("DMJ") owned and operated Jenny Craig franchises in Jackson, Mississippi ("Jackson") and Memphis, Tennessee ("Memphis") until February 14, 2008, under franchise agreements initially entered into with Jenny Craig, but later assigned to JCF. In my position as Vice President of Franchise Operations & Development, I was responsible for overseeing these two franchises.

4. On or about the first week of May, 2007, I visited the centres in Memphis and Jackson. During those site visits I and other JCF employees noted several shortcomings with respect to performance and obligations under the franchise agreement. Shortly following the site

EXHIBIT
A

visits I memorialized those issues in a letter to DMJ, dated May 7, 2007. (A true and correct copy of the May 7, 2007 letter is attached hereto as Exhibit 1). The May 7, 2007 letter raised the following issues: (a) the need to completely refurbish the Jackson centre; (b) the need to update the Memphis centre with a graphics package; (c) the opening of an additional centre in Memphis to take advantage of opportunities in that market; (d) the need to provide P&L statements in the standardized format used by JCF; and (e) the need to submit P&L statements that were due at the time, including the full year 2006 and January through April 2007 statements.

5. On or about May 14, 2007, Mr. Fusco on behalf of DMJ responded to one of the issues raised in the May 7, 2007 letter, namely, Mr. Fusco agreed that DMJ was required to refurbish the Jackson centre. However, when Mr. Fusco submitted paperwork for the refurbishing he omitted the floor plans of the centre. Without the floor plans, JCF could not provide a proposal for the refurbishing. JCF never received the floor plans from Mr. Fusco, despite repeated requests.

6. On or about July 19, 2007, DMJ closed the Jackson centre without prior notice to JCF, as required by the franchise agreement. On or about that time I sent Mr. Fusco a letter requesting an explanation of the closure. Mr. Fusco informed me that the Jackson centre had experienced a freezer problem, and had to close, since they could not provide food to their customers. (A true and correct copy of the July 19, 2007 e-mail message from Mr. Fusco to Devon Battee-Coleman, a franchise operations coordinator at Jenny Craig, is attached hereto as Exhibit 2). After further investigation by JCF, JCF learned that the real reason for the closure was that the state tax authorities had issued a lien on the property for failure to pay sales taxes. (A true and correct copy of the August 20, 2007 e-mail message from Mr. Fusco to me is attached hereto as Exhibit 3).

7. On or about July 24, 2007, I sent a second letter to DMJ stating that, unless the centre re-opened by July 27, 2007, JCF may exercise its right to terminate the franchise agreement for the centre effective immediately since the centre closure constituted abandonment.

8. On or about July 27, 2007, Mr. Fusco sent me an e-mail stating that he expected to be able to open again for business the same day. Subsequent requests for documents indicating that they were authorized to open were ignored.

9. By November, 2007, DMJ had not addressed or cured any of the issues noted in my letter sent to Mr. Fusco on May 7, 2007. On November 16, 2007, I sent a letter to DMJ, addressed to Mr. Fusco, giving DMJ notice of the default under the franchise agreements for the Jackson and Memphis centres and the area development agreements between JCF and DMJ for the Jackson and Memphis areas. (A true and correct copy of the November 16, 2007 letter is attached hereto as Exhibit 4). In that letter I gave DMJ 90 days to cure the defaults otherwise the agreement for the Jackson and Memphis centres would terminate on February 14, 2008. The letter also stated that: "You must cure all the defaults in full before the end of the cure period, or the Agreements will terminate on February 14, 2008 without any further notice" and that "The negotiations of a transfer will not give you any additional time to cure the defaults under the Agreements, and if it would not be consummated before the end of the cure period the Agreements will be terminated as set forth in this letter." *See* Exhibit 4. I received no response from DMJ.

10. On or about December 7, 2007, I sent another letter to DMJ noting that I had not received any response from DMJ and further noting that since DMJ failed to register and attend Jenny Craig's annual conference, one of the defaults that had to be cured pursuant to the

November 16, 2007 letter, that DMJ no longer had the right to cure. (A true and correct copy of the December 7, 2007 letter is attached hereto as Exhibit 5). The letter further explained that DMJ's options were now limited to transferring the agreements to a third party, or to allow JCFto take over pursuant to the post-termination provisions in the franchise agreements.

11. On or about the second week of January 2008 Mr. Fusco and I had a phone conversation whereby Mr. Fusco informed me that he was talking to Mr. Ken Carter about Mr. Carter purchasing the centres from DMJ. At no time did I tell Mr. Fusco that the termination deadline of February 14, 2008, would be extended to accommodate a transaction between DMJ and any third party, including Mr. Carter.

12. On or about January 23, 2008, I sent DMJ a letter reiterating that the franchise agreements would terminate on February 14, 2008 and explaining that JCF needed to begin the process to transition the centres from DMJ's control to JCF's control. (A true and correct copy of the January 23, 2008 letter is attached hereto as Exhibit 6). The letter requested information on many different agreements and arrangements between DMJ and its customers, suppliers, and employees, necessary to help JCF step in to take over operations of the centres upon termination. *Id.* The letter requested that the information be provided by February 1, 2008, and also outlined a transition plan, including coming to the centres on February 11, 2008, to take inventory and get ready for the transition to the centres being operated by JCF. *Id.*

13. On or about February 8, 2008, I had a phone conversation with Mr. Fusco indicating that JCF had received a draft Asset Purchase Agreement ("APA") from Mr. Fusco's Lawyer. I told Mr. Fusco that we would begin reviewing the draft but that I needed the fully executed document in our hands before the termination date of February 14, 2008. I indicated that if we had the fully executed document in our hands by February 13th we would take time to

review the offer and determine whether we wanted to exercise our Right of First Refusal ("ROFR") under the franchise agreements. I also told Mr. Fusco that if we did not exercise our ROFR and if he wanted to proceed with the transfer, then we would allow Mr. Fusco and Mr. Carter time to complete the process. Pursuant to section 13.2 of the franchise agreement, the transfer would be subject to Jenny Craig's approval. I previously discussed this requirement with both Mr. Fusco and Mr. Carter. (A true and correct copy of the e-mail correspondence sent by me to Mr. Ken Carter on February 1, 2008 is attached hereto as Exhibit 7). I indicated that I did not know what form of communication or document we would need to put in place that would acknowledge the time period after the 14th while we considered our ROFR. But, this was all conditioned on the requirement to have a fully executed document in our hands by February 13, 2008.

14. On or about February 8, 2008, I had a similar phone conversation with Mr. Carter and told him in no uncertain terms that JCF must have a fully executed APA before February 14, 2008, in order for us to determine whether we would exercise our ROFR.

15. On or about February 13, 2008, I sent an email to Mr. Fusco's attorney stating that we needed a fully executed APA that same day because the franchise agreements were to terminate on February 14, 2008. (A true and correct copy of the e-mail correspondence sent by me to Mr. Thomas Buckner, Esq. on February 13, 2008 is attached hereto as Exhibit 8).

16. On or about February 13, 2008, I had a phone conversation with Mrs. Jo Ann Fusco. I very clearly stated that we needed the fully executed agreement no later than February 13, 2008. She was very angry and said she was not aware of that requirement because she had been out of town for the previous few days. I said that her husband, Mr. Fusco, and their attorney

were fully aware of that requirement based on the phone conversation with Mr. Fusco on February 8, 2008 and e-mail to the Fusco's attorney earlier that same day.

17. Even as of the date of this affidavit I have not received a fully executed APA. Rather, all I received was the draft APA from Mr. Fusco's attorney with almost all pertinent information, except for price, missing. (A true and correct copy of the draft APA received by me on or about February 8, 2008, is attached hereto as Exhibit 9). Information missing included the names of the seller and buyer, and the schedules that were supposed to contain information about what assets were being purchased, the liens attached to those assets and the liabilities being assumed, were blank. *Id.*

18. I never told Mr. Fusco or Mr. Carter that I would extend the termination date until some time in the future when Mr. Carter returned from Australia.

19. On February 15, 2008, I sent a post termination letter to DMJ. (A true and correct copy of the February 15, 2008 letter is attached hereto as Exhibit 10). In that letter I notified DMJ that the franchise agreements terminated on February 14, 2008. I also offered DMJ $300,000 (less amounts owed to JCF) for the fair market value of the fittings and equipment for the centres pursuant to the franchise agreements. This offer would remain open until February 20, 2008.

20. Additionally, my February 15, 2008 letter informed DMJ that JCF would be taking control of the operations of the centres during the next week, which included sending personnel to the centres to take inventory, change the locks, and ensure that staff members were paid and working, and that clients were serviced in order to continue operations in both centres. Upon taking control of the centres, JCF would continue to operate the business without interruption.

21. Currently, DMJ owes JCF and its affiliates approximately $100,000 in overdue payments for food and royalties. Furthermore, as of February 20, 2008, DMJ owed the landlord for the Jackson Centre property $6,700 in rent of which $5,000 is overdue. DMJ also previously owed $28,000 in overdue rent on the Memphis Centre. The landlord for the Memphis Centre property included the overdue amount as part of DMJ's monthly rent payments under the new lease recently signed by DMJ.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Dated: February 28, 2007

By: ______________________
Doug Fisher

Sworn to and subscribed before me this, the 27th day of February, 2008.

____
NOTARY PUBLIC

My Commission Expires: __________

See attached
DK

CALIFORNIA JURAT WITH AFFIANT STATEMENT

☒ See Attached Document (Notary to cross out lines 1–6 below)
☐ See Statement Below (Lines 1–5 to be completed only by document signer[s], *not* Notary)

Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California
County of San Diego

Subscribed and sworn to (or affirmed) before me on this 28th day of February, 2008, by
Date Month Year

(1) Douglas Fisher,
Name of Signer

proved to me on the basis of satisfactory evidence be the person who appeared before me (.) ~~(,)~~

~~(and~~

(2) ______________________,
Name of Signer

~~proved to me on the basis of satisfactory evidence be the person who appeared before me.)~~

Signature ______________________
Signature of Notary Public

DANIEL KLIMASZEWSKI
Commission # 1783010
Notary Public - California
San Diego County
My Comm. Expires Dec 2, 2011

Place Notary Seal Above

OPTIONAL

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Title or Type of Document: ______________________

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Signer(s) Other Than Named Above: ______________________

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Jenny Craig

May 7, 2007

Mr. Jon Fusco
DMJ, Inc
6006 Sweetbrier Cove
Memphis, TN 38120

Dear Jon:

It was great to visit with you and your team last week. We really appreciate the hospitality. As discussed at lunch, there are several areas of your operation that need your attention as outlined below:

1. Upgrading of centres. As discussed, the Jackson, TN centre needs a complete refurbishment. Jennifer Evans has sent you the refurbishment approval package. Please review and return the application to us no later than May 15th. Also, the Memphis centre needs the graphics package installed. We discussed the necessity of removing the wallpaper and refinishing the walls in order to ensure the lettering adheres properly. Please communicate directly with Jennifer if you have any questions.
2. New centre opening in Memphis. You agreed to begin the process to open at least one new centre in Memphis. Our tour of the area around Collierville indicated ample opportunity for an additional centre. As discussed, you need to target to open the new centre by the end of 2007. I indicated that we are beginning to work with a company that will assist in the site location and lease negotiation process. Please let us know if you would like to use their services.
3. Compliance. You indicated that you are in the process of re-formatting your P&L onto the standardized format. We need your P&L's on a monthly basis. Because you have not submitted P&L's for a long time, I will expect to see your full year 2006 and January through April, 2007 no later than May 31, 2007. Sharon also asked for your current media plan. Please submit with the P&L's by the end of May.

Jon, I'm sure you sensed our disappointment with your performance with respect to the issues outlined here. In the past you have promised to correct these and we have seen no progress. While it is not my desire to put you in default of your franchise agreement, I will have no choice if the corrections as outlined here are not made in a timely manner.

Thank you for you attention to these matters and let me know if you have any questions.

Regards,

Douglas P. Fisher
Vice President, Franchise Operations and Development

CC: Sharon Vickers
Lewis Shender
Jennifer Evans

EXHIBIT
1

DMJ letter

REDACTED

From: jon p fusco [mailto:fuscoj@bellsouth.net]
Sent: Thursday, July 19, 2007 2:55 PM
To: Devon Battee
Subject: RE: 8155 Centre Hours

Devon:
We had our freezer compressor go out some time Tuesday night. We thought we had contacted all clients that were scheduled and let them know it would be probably Friday before we could sell food again. All frozen food was moved to a warehouse until repairs are done to save from disposing of the product. This is not the remodel issue, yet.
Jon

From: Devon Battee [mailto:DBattee@JENNYCRAIG.com]
Sent: Thursday, July 19, 2007 4:45 PM
To: fuscoj@bellsouth.net; Sharon Vickers
Cc: Lisa Herndon; Doug Fisher; Vic DeSio; Tracy Heiser; Jennifer Evans
Subject: 8155 Centre Hours

Hi Jon,

I wanted to check with you on your centre status and hours for 8155. Our Corporate Jenny Care Department has been getting numerous calls today from clients, stating that they are clients at this centre location and that they have been told that this location will be closed for a short period of time. A Jenny Care representative has also attempted to contact this location directly and has had no answer.

The Franchise Department is not currently aware of any refurbishing project at this location so we are quite concerned as to why your clients might be getting this impression. Please contact us as soon as possible and let us know what might be happening.

Thank You,

Devon Battee-Coleman
Jenny Craig International
Franchise Operations Coordinator

EXHIBIT
2

2/26/2008

REDACTED

From: jon p fusco [mailto:fuscoj@bellsouth.net]
Sent: Monday, August 20, 2007 9:59 AM
To: Doug Fisher
Subject: RE: Jackson Status

Doug:

1) **I have spoke to the MS State Tax Commission and they have assured me that we are OK to operate, just have not received the official forms you. They said if we were not OK they would have let us know by now.**
2) **My meeting with the local contractor was cancelled last month during the problem. I need to re-schedule with them**
3) **I have not had a chance to break out the April #'s from the Jan-April I sent you, but will try to get it and the 2nd quarter done this week. I have sales tax to do today.**

Jon

From: Doug Fisher [mailto:DFisher@JENNYCRAIG.com]
Sent: Monday, August 20, 2007 11:05 AM
To: fuscoj@bellsouth.net
Cc: Sharon Vickers
Subject: Jackson Status

EXHIBIT 3

Jon - Please provide updates on the following:
1. Have you received the documentation allowing you to re-open the Jackson centre? It's been several weeks and I seen nothing.

2. Do you have a plan to refurbish the Jackson centre? It's been several months since we discussed this and I have not seen a plan.

3. Have not seen P&L's from you since the April. We need quarterly reports. Please update for Jan-March and

April-June plus year to date. I need these by the end of the week.

Doug

Doug Fisher
VP, Franchise Operations and Development
Jenny Craig, Inc.
5770 Fleet St.
Carlsbad, CA 92008
Phone: 760-696-4710
Fax: 760-696-4709

Jenny Craig®

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5770 Fleet Street
Carlsbad, CA 92008-4700

(760) 696-4000
(760) 696-4001 Fax

DMJ, Inc.
6006 Sweetbrier Cove
Memphis, TN 38120
Attn: Jon Fusco

VIA FEDERAL EXPRESS AND E-MAIL

November 16, 2007

Re: Notice of Default under Franchise Agreements Nos. 8155 and 8072 and Related Area Development Agreements

Dear Jon:

This letter serves as notification of default under the following agreements: (i) Area Development Agreement by and between Jenny Craig International, Inc. ("JCI") and DMJ, Inc. ("DMJ") effective as of April 1, 2001, for Jackson, Mississippi ("Jackson ADA"), (ii) the Franchise Agreement by and between JCI and DMJ effective April 1, 2001 for the Jackson, Mississippi Centre ("Jackson Franchise Agreement"), (iii) the Area Development Agreement by and between JCI and DMJ effective April 1, 2001, for Memphis, Tennessee ("Memphis ADA", and jointly with the Jackson ADA, the "Area Development Agreements"), and (iv) the Franchise Agreement by and between JCI and DMJ effective April 1, 2001 for the Memphis, Tennessee Centre (jointly, with the Jackson Franchise Agreement, the "Franchise Agreements" and the Franchise Agreements jointly with the Area Development Agreements, the "Agreements"). JCI has previously assigned its rights and obligations under the Agreements to Jenny Craig Franchising, LLC ("JCF").

This notice is based on our rights under Section 14.1 of the Franchise Agreements and Section 7.A. of the Area Development Agreements. Each agreement allows us to terminate if there is a default under that particular agreement or any other agreement between DMJ and JCF. DMJ is in default under the Agreements for several reasons, including the following:

1. **Centre Upgrades** - We have discussed with you for a very long time now the need to completely refurbish the Jackson Centre and also the need to install the graphics package in the Memphis Centre. DMJ is required to do so under both the Franchise Agreements (Sections 3.5 and 9.11). To date, our repeated requests to you to comply with this obligation have gone largely unanswered. You submitted a Franchise Application for Refurb Approval for the Jackson Centre on May 14 of this year, but it was missing the Centre floor plan. We have still not received the floor plan, without which the refurbishment process cannot proceed. On June 5 in an e-mail to Douglas Fisher you informed us that you had not yet received any proposals for the Memphis Centre. Again, you were informed that the

EXHIBIT 4

refurbishment process cannot proceed without a centre floor plan, but we have not received such floor plan or any further information from you on the refurbishment of the Memphis Centre since then.

2. **New Centre Openings** - You indicated to us as early as October 2005 your intention to open an additional centre in the Memphis area. Most recently, you confirmed this intention during our visit with you and your team. During the week of April 30 you agreed to begin the process to open at least one new centre in Memphis. In a letter sent to you on May 7, we indicated that we expected you to be able to open the new centre by the end of 2007. It is now November, and you have still not taken the necessary steps to even identify a location for a new centre. The Exhibit I to the Memphis ADA requires you to use your best efforts to open additional centres as may be necessary to develop the development area to its maximum economic potential. On June 14 you informed Douglas Fisher in an e-mail that you were waiting for proposals for new sites, but since then we have not received any information from you regarding steps taken to open an additional centre in the Memphis area.

3. **Timely Reports** - Pursuant to the operations manual, DMJ must provide us with monthly P&L reports. You are currently behind on your reporting obligations, as you have been for most of this year. The last P&L report that we received from you was for the first calendar quarter of 2007. The report was not in the proper electronic format. We have not received any P&L reports from you since. Your failure to provide such reports is a breach of the Franchise Agreements, including Sections 9.11 and 9.12. Furthermore, you have also failed to send us several other quarterly compliance reports.

4. **Media Plan** - DMJ is required to provide us with an annual media plan for your centres. This type of plan was most recently requested of our franchisees on October 5. You have not provided us with media plans for your centres, which constitutes a breach of the Franchise Agreement. You are required to comply with the operations manual pursuant to Sections 9.11 and 9.24.

5. **Conference Participation** - You have not registered yourself or key operations personnel for participation in the upcoming franchisee conference. You are required to participate in the conference pursuant to Section 9.15 of the Franchise Agreements. In addition to fail to participate in the upcoming conference, you have also failed to participate in the vast majority of monthly franchisee calls and other network conference calls that we have organized.

6. **Staffing obligation** - Under Section 9.2 of the Franchise Agreements you are required to employ sufficient qualified staff to operate each centre efficiently. We noted in the Market Visit Report, dated April 25, that the Jackson centre was insufficiently staffed, in several respects. Your e-mail to Devon Battee on November 14 regarding conference participation indicates the reason you are not participating in the upcoming franchisee conference is because the centres are short-staffed, so it appears that the issues raised in April have not been satisfactorily addressed.

7. **Sales Tax Proof** - Following the closure and subsequent re-opening of your Jackson Centre for failure to pay sales tax, you informed us on June 27 that written proof of the state's

approval for the centre to re-open was forthcoming within a week or two. We inquired about written proof on several occasions thereafter, but to date have not received such proof. You are required to comply with all state and local laws, regulations and requirements pursuant to Section 9.23.1 of the Franchise Agreements.

Based on the foregoing we are hereby giving you 90 days from the date of this letter to cure all of the above defaults. With respect to the new centre opening, if you are not able to have the new centre opened by the cure period, you will have to provide us with a fully executed lease for the additional centre (the location must be approved by us before you can enter into the lease) before the cure period. You must cure all the defaults in full before the end of the cure period, or the Agreements will terminate on February 14, 2008 without any further notice. If you wish to transfer your centres to a new owner, please be aware that such a transfer is subject to the transfer provisions in the Agreements and that any transferee would be required to cure the defaults promptly in addition to any other transfer requirements that we may enforce under the Agreements. The negotiations of a transfer will not give you any additional time to cure the defaults under the Agreements, and if it would not be consummated before the end of the cure period the Agreements will be terminated as set forth in this letter.

Sincerely,

JENNY CRAIG FRANCHISING, LLC

Douglas Fisher
Vice President of Franchise Operations & Development

Cc: Patti Larchet, CEO
Kimberly Matthews, Assistant General Counsel
Beata Krakus, Sonnenschein, Nath & Rosenthal, LLP
Sharon Vickers, Franchise Business Consultant
Victor DeSio, Director, Franchise Development
Lisa Herndon, Manager, Franchise Operations

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Jenny Craig®

Jenny Craig, Inc.
5770 Fleet Street
Carlsbad, CA 92008-4700

(760) 696-4000
(760) 696-4001 Fax

DMJ, Inc.
6006 Sweetbrier Cove
Memphis, TN 38120
Attn: Jon Fusco, President

VIA FEDERAL EXPRESS AND E-MAIL

December 7, 2007

Re: Follow-up to Letter of November 16, 2007

Dear Jon:

We are writing to you to follow up on the Notice of Default letter ("Default Letter") sent to you on November 16, 2007 since we have not heard anything further from you regarding this matter other than your acknowledgement of receipt of the Default Letter.

Even though almost a month has passed since the Default Letter was sent to you, we have had no indication from you that you are taking any steps to cure the defaults listed therein (the "Defaults"). More importantly, one of the Defaults specifically addressed in the Default Letter was your failure to register for our franchisee conference. As you know, the conference was held this past weekend, and since you did not attend, this default is no longer susceptible to cure. Therefore, because DMJ, Inc. will no longer be able to cure all the Defaults, which was the condition to avoid termination of your Franchise Agreements and Area Development Agreements, those agreements will terminate on February 14, 2008, which is the end of the notice period set forth in the Default Letter.

Consequently, at this point, your remaining option is to sell the rights under your agreements to a third party that we approve. If a transfer is not completed before February 14, 2008, your agreements will terminate as of that date and you will have to stop operations of your centres immediately. If a transfer is not completed by that date and the agreements are terminated we have the right, pursuant to the Franchise Agreements, to step in to take over your centre leases, and acquire the equipment and centre fittings that we choose at fair market value. Note that while we would consider taking over the centres if you do not find an appropriate transferee, we do not promise or guarantee you that we would do so. Please contact us as soon as possible to discuss a transition plan for your centres.

Sincerely,

JENNY CRAIG FRANCHISING, LLC

Douglas Fisher
Vice President of Franchise Operations & Development

Cc: Patti Larchet, CEO
Kimberly Matthews, Assistant General Counsel
Beata Krakus, Sonnenschein, Nath & Rosenthal, LLP
Sharon Vickers, Franchise Business Consultant
Victor DeSio, Director, Franchise Development
Lisa Herndon, Manager, Franchise Operations

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EXHIBIT 5

Jenny Craig®

Jenny Craig, Inc.
5770 Fleet Street
Carlsbad, CA 92008-4700

(760) 696-4000
(760) 696-4001 Fax

DMJ, Inc.
6006 Sweetbrier Cove
Memphis, TN 38120
Attn: Jon Fusco, President

January 23, 2008

Re: Termination Process

Dear Jon:

As communicated in earlier correspondence, your Area Development Agreements for the Memphis, TN area and for the Jackson, MS area, and your Franchise Agreements for locations in Memphis, TN and Jackson, MS, will all terminate on February 14, 2008. While we understand you are in discussions to sell your business, we are now at a stage where we must begin the transition process should a sale not take place and we decide to exercise our rights to buy certain assets and take over the lease of your premises and leased equipment. This letter is a request for information and a description of the process leading up to February 14th.

Information Needed:

- Copies of leases for both franchised locations
- Landlord contact information. We intend to contact landlords by the first part of next week to discuss transfer specifics. We have the contact for the Memphis lease and if you haven't supplied the contact for the Jackson location we will obtain the information independently and make the contact.
- All vendor information for both locations including but not limited to:
    - Gas/electric
    - Trash
    - Water
    - Pest control
    - Drinking Water
    - Custodial Services
    - Phone
    - Internet
- All employee information including the following:
    - Names
    - Centre worked
    - Position
    - Tenure
    - Full or Part time
    - Base Pay
    - Commission Structure
    - Benefits (Medical, Dental, Retirement etc.)
    - Work Schedules
- Complete list of all physical assets to include current book value

Please provide the lease information immediately and the balance of the all above information no later than Friday February 1, 2008.

EXHIBIT
6

Transition Plan:

- We will contact landlords by the first part of next week to discuss possible lease assignments.
- We will plan to be in your centres the week of February 11th to inventory and verify all assets.
- At the same time we will meet with all staff to notify them of employment opportunities and requirements.
- On the night of February 13, 2008 we will take a physical inventory of existing food and products.

As outlined in the Franchise Agreement, we will determine fair market value of all assets that we decide to purchase and deduct the amount from any outstanding debt owed to us. Any remaining monies owed to us will still be your obligation to pay.

If you still intend to attempt to sell your business we will need, at a minimum, evidence that you are in serious discussions and that a sale has a high likelihood within a short time frame. We will need to know this by February 1, 2008 to provide us the opportunity to evaluate the terms of the sale.

I look forward to your prompt response to the requested information. Please let me know if you have any questions.

Regards.

JENNY CRAIG FRANCHISING, LLC

Douglas Fisher
Vice President, Franchise Operations and Development

CC: Patti Larchet, CEO
Kimberly Matthews, Acting General Counsel
John Baer, Sonnenschein, Nath & Rosenthal, LLP
Sharon Vickers, Franchise Business Consultant
Victor DeSio, Director Franchise Development
Lisa Herndon, Manager Franchise Operations

REDACTED

From: Doug Fisher
Sent: Tuesday, February 05, 2008 3:58 PM
To: 'Ken Carter'
Subject: RE: Memphis Sale

Ken – We are now on a very tight timeline. These franchise agreements terminate effective February 14th. We need to begin the transition process next week. If you guys cannot present a bona fide term sheet by the end of this week, we will have to assume that a deal will not happen and we will start the transition process. Keep me posted. Thanks.
Doug

Doug Fisher
VP, Franchise Operations and Development
760-696-4710 (Phone)
760-696-4709 (Fax)
Jenny Craig, Inc.
dfisher@jennycraig.com

From: Ken Carter [mailto:krcarter@telus.net]
Sent: Tuesday, February 05, 2008 2:05 PM
To: Doug Fisher
Subject: RE: Memphis Sale

Doug - I was in Vancouver for a conference for 3 days (and had nothing to report regardless). If we do manage to reach a business agreement, you guys are free, as always, to exercise whatever legal rights you have on the details.

Ken

From: Doug Fisher [mailto:DFisher@JENNYCRAIG.com]
Sent: Friday, February 01, 2008 2:26 PM
To: kcarter@jennycraig.com.au; krcarter@telus.net
Subject: Memphis Sale

EXHIBIT 7

Ken – Jon tells me that you have made an offer and that he has responded. He also tells me that the deal includes a 2-3 year employment agreement. I have told him that we would not approve a sale that included his or Joanne's involvement in the on-going business. I believe I mentioned this to you last week as well. So, please keep this in mind when/if finalizing the deal. Thanks.
Doug

Doug Fisher
VP, Franchise Operations and Development
760-696-4710 (Phone)
760-696-4709 (Fax)
Jenny Craig, Inc.
dfisher@jennycraig.com

REDACTED

-----Original Message-----
From: Doug Fisher
Sent: Wednesday, February 13, 2008 8:09 AM
To: tbuckner@appersoncrump.com
Subject: RE: Transfer of Memphis and Jackson, MS

We are not obligated to respond until we see a fully executed Asset Purchase Agreement. I need that TODAY. The franchise agreements terminate tomorow Doug Fisher

-----Original Message-----
From: "tbuckner@appersoncrump.com" <tbuckner@appersoncrump.com>
To: "DFisher@JENNYCRAIG.com" <DFisher@JENNYCRAIG.com>
Cc: "fuscoj@bellsouth.net" <fuscoj@bellsouth.net>; "mclark@snclaw.com" <mclark@snclaw.com>
Sent: 2/13/08 9:19 AM
Subject: RE: Transfer of Memphis and Jackson, MS

Doug,
When do you expect to let us know if you will exercise your Right of First Refusal? We will let you know when the agreement has been fully executed by both parties.
Tom Buckner

-----Original Message-----
From: Doug Fisher [mailto:DFisher@JENNYCRAIG.com]
Sent: Monday, February 11, 2008 12:50 PM
To: Thomas R. Buckner
Subject: RE: Transfer of Memphis and Jackson, MS

Tom - Thanks for the draft. We are reviewing to determine if we want to exercise our Right of First Refusal. In the meantime, I need to know when this agreement has been fully executed by both parties. Thanks.
Doug Fisher

-----Original Message-----
From: "tbuckner@appersoncrump.com" <tbuckner@appersoncrump.com>
To: "dfisher@jennycraig.com" <dfisher@jennycraig.com>
Cc: "fuscoj@bellsouth.net" <fuscoj@bellsouth.net>; "mclark@snclaw.com" <mclark@snclaw.com>
Sent: 2/8/08 4:00 PM
Subject: Transfer of Memphis and Jackson, MS

EXHIBIT 8

Mr. Fisher,

Attached are drafts of Asset Purchase Agreement and Consulting Agreement which provide for the transfer of the Memphis and Jackson, MS Jenny Craig stores to an entity controlled by Ken Carter. These drafts were sent to us this morning by Mr. Carter's attorney, Matt Clark (whose email is attached), and Jon Fusco and I are reviewing them. We will send you copies of the finalized agreements. In the meanwhile, we ask that you begin your review process and determine whether Jenny Craig desires to exercise its right of first refusal.

Tom Buckner

Thomas R. Buckner

Apperson, Crump & Maxwell, PLC

6000 Poplar Avenue, Suite 400

Memphis, TN 38119-3972

901-260-5122

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Circular 230 Disclosure: In compliance with requirements imposed by the IRS pursuant to IRS Circular 230, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of
(i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

REDACTED

From: tbuckner@appersoncrump.com [mailto:tbuckner@appersoncrump.com]
Sent: Friday, February 08, 2008 1:02 PM
To: Doug Fisher
Cc: fuscoj@bellsouth.net; mclark@snclaw.com
Subject: Transfer of Memphis and Jackson, MS

Mr. Fisher,

Attached are drafts of Asset Purchase Agreement and Consulting Agreement which provide for the transfer of the Memphis and Jackson, MS Jenny Craig stores to an entity controlled by Ken Carter. These drafts were sent to us this morning by Mr. Carter's attorney, Matt Clark (whose email is attached), and Jon Fusco and I are reviewing them. We will send you copies of the finalized agreements. In the meanwhile, we ask that you begin your review process and determine whether Jenny Craig desires to exercise its right of first refusal.

Tom Buckner

EXHIBIT 9

APPERSON CRUMP

Thomas R. Buckner
Apperson, Crump & Maxwell, PLC
6000 Poplar Avenue, Suite 400
Memphis, TN 38119-3972
901-260-5122

This communication is from a law firm and may contain privileged and confidential information. Communications between attorneys and their clients are privileged and protected by law from unauthorized disclosure. This communication is intended only for the use of the above named person(s). Do not read, copy, or disseminate this communication unless you are the intended addressee. If this communication is received in error, please advise the sender by reply email and destroy all copies of the original message.
Circular 230 Disclosure: In compliance with requirements imposed by the IRS pursuant to IRS Circular 230, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

Joye E. Thetford

From: Thomas R. Buckner
Sent: Friday, February 08, 2008 11:17 AM
To: Joye E. Thetford
Subject: FW: Jenny Craig/ Fuscos

Attachments: Carter Consulting Agreement.doc; Carter APA - Draft.doc

Carter Consulting Agreement.do... Carter APA - Draft.doc (282 KB...
pp

-----Original Message-----
From: Matt Clark [mailto:mclark@snclaw.com]
Sent: Friday, February 08, 2008 11:08 AM
To: Thomas R. Buckner
Cc: krcarter@telus.net
Subject: Jenny Craig/ Fuscos

Tom:

Please find attached the proposed offer from Ken Carter to your clients, the Fuscos. The essential business terms are contained in the attached draft asset sale agreement and consulting agreement. If your clients accept these business terms, we can fill in the bullets later.

If you have any questions, please do not hesitate to call or email me.
I will be available by email over the weekend.

Regards,

Matthew Clark

SHEA NERLAND CALNAN LLP
Barristers and Solicitors
2800, 715-5th Ave. SW
Calgary, Alberta T2P 2X6

Direct: (403) 299-9620
Fax: (403) 299-9601
Email: mclark@snclaw.com

CONSULTING AGREEMENT

THIS AGREEMENT effective as of the ● day of ●, 2008 ("***Effective Date***"), between:

> **TN NEWCO**, a body corporate, with an office in the Province of Alberta (the "***Company***")
>
> and
>
> **JON FUSCO and JOANNE FUSCO**, individuals resident in Memphis, Tennessee (the "***Contractors***" or the "**Fuscos**")

WHEREAS the Contractors have been employed by [●] ("***FuscoCo.***") in the position of ● since ●.

WHEREAS the Company is acquiring all of the assets of FuscoCo. pursuant to an asset purchase agreement (the "***Asset Purchase Agreement***") dated ●, 2008 between, among others, the Company, FuscoCo., and the Contractors.

WHEREAS the Company wishes to retain the Contractors following the closing of the transaction pursuant to the Asset Purchase Agreement, and it is a condition of such closing that the Contractors enter into this Agreement with the Company.

NOW THEREFORE the parties hereto wish to set out the terms and conditions of their employment relationship in this Agreement.

Article 1
Term of employment and definitions

1.1 The Contractors will be employed with the Company in accordance with the express terms, duties and obligations hereinafter set forth until this Agreement is terminated in accordance with the provisions hereof, subject to such notifications and amendments as may be agreed upon from time to time.

1.2 For the purpose of this Agreement, the following terms shall have the meanings specified below:

(a) "***Agreement***" means this employment agreement.

(b) "***Board***" means the board of directors of the Company or Group Company from time to time and any other person or persons authorised by the Board as its representative for the purposes of this Agreement.

(c) "***Company Business***" means owning and operating Jenny Craig stores in Memphis, Tennessee and Jackson, Mississippi.

(d) "***Confidential Information***" means all information owned, possessed or controlled by the Company or any Group Company, or that of the Company's or any Group Company's customers, Contractorss, shareholders, suppliers or insurance or reinsurance intermediaries including, without limitation, all information bought by the Company under the Asset Purchase Agreement, all agreements, customer lists, Contractors information, costs and pricing and other financial records, procedures, operations, business software and computer programs and printouts, buying records and habits, sales records, product costs, long-range plans, current and future marketing and corporate strategies, territory listings, profitability analysis, new product developments, including but not limited to direct risk solutions or insurance broking services, supplier lists, techniques and other aspects of its business, reports, tests, research, development, product design, engineering data, processes, proposed or ongoing investments or disposals, inventions and the amounts by and the manner in which the Company or Group Companies reward and seek to retain Contractorss, howsoever received by the Contractors from, through or relating to the Company or its Group Companies and in whatever form. Confidential Information does not include:

(i) information that is in the public domain through no wrongful act of the Contractors; or

(ii) information that was received by the Contractors from a third party who was free to disclose that information provided that information was not disclosed in confidence

(e) "*Customer*" means any person or Entity who, in the 12 months preceding the date of termination of the Contractors' employment hereunder for any reason, has (i) purchased or licensed from the Company or any Group Company (with the Contractors' knowledge) any product produced or service supplied, sold, licensed or distributed by the Company or any Group Company or, (ii) supplied to the Company or any Group Company (with the Contractors' knowledge) any product to be produced, sold, licensed or distributed by the Company.

(f) "*Entity*" means a natural or legal person, partnership, limited partnership, limited liability partnership, company, joint stock company, trust, unincorporated association, joint venture or other entity or governmental entity, and pronouns have a similarly extended meaning.

(g) "*Group Company*" means:

(i) any holding company or companies of the Company;

(ii) any subsidiary of the Company or its holding body or bodies corporate;

(iii) any assignee or nominee of the Company; and

(iv) any affiliate of the Company or its holding body or bodies corporate from time to time and wherever registered or incorporated, and references to the "Group" shall be construed accordingly.

(h) "*Prospective Customers*" means:

(i) any person or Entity solicited by the Contractors on behalf of the Company or Group Company for any purpose relating to the Company Business at any time during the 12 month period immediately preceding the date of termination of the Contractors' employment for any reason; and

(ii) any person or Entity solicited by the Company or Group Company with the Contractors' knowledge for any purpose relating to the Company Business at any time during the 12 month period immediately preceding the date of termination of the Contractors' employment for any reason.

Article 2
Duties

2.1 The Contractors shall serve the Company as required and will report to •, •, TN NEWCO. The Contractors shall perform the duties determined from time to time by the Company to the best of the Contractors' ability. The Contractors shall provide an aggregagte of 60 hours per week in the performance of their duties. Such duties will include assisting in the business as required, supervision of contruction/renovations, basic accounting, including reconciling food shipments and payroll. The Contractors will well and faithfully serve the Company and hereby covenant to use the Contractors' best efforts to promote the interests of the Company at all times during the term of this Agreement.

2.2 During the Contractors' employment, the Contractors will faithfully serve the Company and any Group Company and devote the whole of the Contractors' working time, attention and ability to the business of the Company and any Group Company. The Contractors will not engage in any conduct that would interfere with the performance of the Contractors' duties or that would constitute an actual or perceived conflict of interest. The Contractors will not, directly or indirectly, render services to any Entity other than services with regard to charitable or community service organizations, provided that such activities do not interfere with the Contractors' duties under this Agreement. The Contractors will comply with all applicable laws, regulations and Company and Group Company policies, as amended from time to time, in respect of the conduct of the business of the Company.

Article 3
Remuneration

3.1 Salary

The Contractors will each receive an annual salary of $87,500.00 U.S. Dollars (the "***Annual Salary***") payable monthly, less all required deductions, remittances and withholdings.

Article 4
Term and Termination of this Agreement

4.1 Term

This Agreement shall be for 2 years from the date indicated above but Group Company shall have an option for early termination after completion of one year of service by the Fuscos ("Early Termination"). In the event of Early Termination the Contractors shall each receive a $25,000 lump sum payment, less any deductions that may be required by law.

4.2 By the Contractors

If the Contractors voluntarily terminate the Contractors' employment with the Company, the Contractors agree to provide the Company with 3 months notice of the Contractors' resignation. The Contractors acknowledge that the Company will suffer damages if the Contractors fail to provide 3 months notice as required by this provision.

4.3 Release

The Contractors agree that the payments set out in Section 4.2 above are in full and final satisfaction of any claim by the Contractors arising out of the termination of the Contractors' employment and that no further amounts will be payable to the Contractors, whether under statute, common law or otherwise, in respect of the termination of the Contractors' employment. Prior to receiving any payments in Section 4.1, the Contractors shall provide the Company with an executed release in a form satisfactory to the Company.

Article 5
Confidentiality

5.1 The Contractors acknowledge that the Company and the Group Companies have a legitimate and continuing proprietary interest in the protection of their Confidential Information. Consequently, the Contractors agree that the Contractors will not, except as may be required in the performance of the Contractors' duties under this Agreement, disclose or use any Confidential Information, directly or indirectly, for the Contractors' own benefit or the benefit of another (other than for the benefit of the Company), either during the Contractors' employment or following the effective date of the termination of the Contractors' employment with the Company or any Group Company for any reason.

5.2 The Contractors also agree that the Contractors will not remove or cause to be removed from any premises of the Company or any Group Company, documents or other materials, whether in physical or electronic form involving, recording or containing Confidential Information, except as required to carry out the duties of the Contractors' employment.

Article 6
Non-solicitation

6.1 The Contractors acknowledges that in the Contractors' employment with the Company or any Group Company, the Contractors occupy a position of trust and confidence. The Contractors fully understand that by entering into the non-solicitation covenants (the "Restrictive Covenants") described in this Agreement, the Contractors' ability to earn a livelihood in a business which, directly or indirectly, competes with the Company Business may be limited Nevertheless the Contractors agree that the Contractors has received and will receive sufficient consideration and other benefits as senior Contractors of the Company and as otherwise provided under this Agreement to justify restrictions which, in any event, given the Contractors' education, skills and ability, the Contractors do not believe would prevent the Contractors from earning a living The Contractors recognize and acknowledge that Articles 5, 6 and 7 of this Agreement grant to the Company and the Group Companies only such reasonable protection as is necessary to preserve the legitimate interests of the Company and the Group Companies and the Contractors equally recognize that the description of the Company Business and the scope of the Territory is reasonable. The Contractors acknowledges that the covenants in Sections 5, 6 and 7 are in addition to the Contractors' fiduciary duties at common law.

6.2 Both during the Contractors' employment with the Company and for 12 months after the termination of the Contractors' employment with the Company, for any reason, the Contractors will not, without the written consent of the Company:

(a) directly or indirectly induce or attempt to induce any Customer or Prospective Customer of the Company or any Group Company, to cease doing business in whole or in part with the Company or any Group Company, or solicit the business of any Customer or Prospective Customer of the Company or any Group Company for a purpose which is competitive with the Company Business; or

(b) directly or indirectly solicit, or attempt to solicit or endeavour to cause any Contractors or consultant of the Company or any Group Company to leave the Contractors' employment or to stop performing services for the Company or any Group Company.

Article 7
Remedies

7.1 The Contractors recognize and expressly acknowledge that the Company and Group Companies would be subject to irreparable harm should any of the provisions of Articles 5 and 6 be infringed or should the Contractors breach the Contractors' obligations under these sections, and that damages alone will be an inadequate remedy for any such breach or violation and accordingly, the Contractors agrees that in addition to all other remedies, the Company, acting for itself and on behalf of any Group Company will be entitled as a matter of right to equitable relief, including an interim or permanent injunction.

Article 8
Notice

8.1 If notice is required to be given under this Agreement, that such notice must be in writing and delivered personally or sent by registered mail, as follows:

If to the Company: •

If to the Contractors: •

or to such other addresses as the Contractors or the Company may, from time to time, advise. Notice is deemed given on the date it is delivered personally to the recipient, or 5 days after being mailed by registered mail.

Article 9
General provisions

9.1 This Agreement shall inure to the benefit of and shall be binding upon the Contractors' heirs, executors, administrators, successors and legal representatives, and shall inure to the benefit of and be binding upon the Company and its successors and assigns. The Contractors may not assign this Agreement.

9.2 This Agreement constitutes the complete understanding between the Contractors and the Company with respect to the Contractors' employment, and no statement, representation, warranty or covenant has been made by the Contractors or the Company with respect to this Agreement except as expressly set forth herein. This Agreement shall not be altered, modified, amended or terminated unless agreed to in writing by both the Contractors and the Company.

9.3 A waiver by the Contractors or the Company of any breach under this Agreement shall not constitute a waiver of any further breaches of this Agreement.

9.4 This Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable in Alberta.

9.5 If any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid and unenforceable to any extent, the remainder of this Agreement shall not be affected by that invalidity.

9.6 Notwithstanding the termination of this Agreement, the Contractors and the Company shall remain bound by the provisions of this Agreement, which by their nature survive the termination of this Agreement for any reason and continue to apply, including, but not limited to, Articles 5, 6, and 6.

9.7 The Contractors acknowledges that the Contractors is under no restrictions that would prevent the Contractors from entering into this Agreement or carrying out the Contractors's duties under this Agreement.

9.8 The Contractors acknowledges that the Contractors has obtained independent legal advice with respect to the nature and consequences of entering into this Agreement.

IN WITNESS WHEREOF the parties hereto have executed and delivered this Agreement as of the date first written above.

______________________________ ______________________________

Witness **JON FUSCO**

[TN NEWCO]

Per: ______________________________

ASSET PURCHASE AGREEMENT

BETWEEN:

[FUSCO CO]
(AS VENDOR)

- AND -

[TN NEWCO]
(AS PURCHASER)

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ASSET PURCHASE AGREEMENT

THIS AGREEMENT made February •, 2008.

BETWEEN:

[**FUSCO CO.**], a corporation established and subsisting pursuant to the laws of the State of Tennessee (the "**Vendor**")

- and -

[**TN NEWCO**], a corporation established and subsisting pursuant to the laws of the State of Tennessee (the "**Purchaser**")

WHEREAS Vendor has agreed to sell the Assets to Purchaser and Purchaser has agreed to purchase the Assets from Vendor on the terms and conditions hereinafter set forth;

NOW THEREFORE, in consideration of the covenants and agreements herein, the Parties covenant and agree as follows:

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Agreement, the following words shall have the following meanings:

(a) "**Agreement**" means this Agreement, including the recitals and all Schedules to this Agreement, as amended or supplemented from time to time;

(b) "**Assets**" means, in relation to the Business, the entire interest of Vendor in and to:

(i) the Equipment; and

(ii) the Forward Commitments;

(c) "**Assignment Agreement**" means the assignment agreement in the form attached hereto as Schedule "J";

(d) "**Assumed Lease**" means the lease dated • between • and •;

(e) "**Assumed Liabilities**" means those liabilities set forth in Schedule "D";

(f) "**Bill of Sale**" means the bill of sale in the form attached hereto as Schedule "I";

(g) "**Business**" means the operational and support assets of JCIs of the Vendor located in Memphis, Tennessee and Jackson, Mississippi;

(h) "**business day**" means a day other than a Saturday, Sunday or statutory holiday, when banks are generally open for the transaction of banking business in the City of Calgary, Alberta;

(i) "**Cash to Close**" has the meaning set forth in Subsection 2.2;

(j) "**Closing**" means the closing of the transactions contemplated by this Agreement on the Closing Date;

(k) "**Closing Date**" means 12:01 a.m. (Calgary time) on •, or such other time or date as may be agreed to by the Parties in writing;

(l) "**Direction to Pay and Indemnity**" means the direction from Vendor to Purchaser to pay the Purchase Price to the Vendor's Solicitors in accordance with Subsection 2.2 the Agreement;

(m) "**Employees**" means the employees of the Business, or any one or more of them, as the context may require;

(n) "**Environment**" means the atmosphere, the surface and sub-surface of the earth, groundwater and surface water and plants and animals;

(o) "**Equipment**" means the motor vehicles, tanks, trailers and equipment which are listed in Schedule "A" attached hereto;

(p) "**Forward Commitments**" means those commitments as set out in Schedule "C" made by Vendor to third parties for the purpose of maintaining the operation of the Business through to and after the Closing Date only to the extent relating to the Assets or use thereof;

(q) "**GAAP**" means accounting principles generally accepted in Canada as set out in the Canadian Institute of Chartered Accountants Handbook;

(r) "**Interim Statement of Adjustments**" has the meaning set forth in Section 2.5(a);

(s) "**Leased Land and Buildings**" means the land and buildings set forth in Schedule "B";

(t) "**Losses**" has the meaning set forth in Subsection 7.1(a);

(u) "**Non-Competition and Non-Solicitation Agreement**" shall mean the contract in the form attached as Schedule A3 hereto;

(v) "**Offers of Employment**" means the offers of employment to be given to each of the Employees to be effective immediately following Closing on terms and conditions comparable, in the aggregate, to the terms and conditions on which they are currently employed;

(w) "**Party**" means a party to this Agreement;

(x) "**Pay Out Leases**" means those leases of Equipment as set forth in Schedule "F" that Vendor will cause to be paid out of the Purchase Price in full concurrently with Closing, and will provide evidence thereof to Purchaser as soon as commercially possible;

(y) "**Permitted Security**" means security set forth in Schedule "G" which Purchaser will assume on the Closing Date;

(z) "**person**" includes an individual, partnership, firm, trust, body corporate, governmental authority, unincorporated body of persons or association;

(aa) "**Purchaser**" includes [TN NEWCO] as well as any assignee or nominee of [TN NEWCO] as may be determined by [TN NEWCO] in it sole discretion;

(bb) "**Purchase Price**" has the meaning set forth in Section 2.1;

(cc) "**Purchaser Group**" has the meaning set forth in Subsection 7.1(a);

(dd) "**Purchaser's Solicitors**" means Shea Nerland Calnan LLP;

(ee) "**Representatives**" means a Party's employees, agents, consultants and professional advisors;

(ff) "**Security**" means a lien, restriction, charge, security interest, lease, mortgage, encumbrance or other adverse claim of any kind or character whatsoever, including, but not limited to, security more particularly set forth in Schedule "F", but excluding the Permitted Security;

(gg) "**Vendor Group**" has the meaning set forth in Subsection 7 2(a); and

(hh) "**Vendor's Solicitors**" means Apperson Crump.

1.2 Interpretation

In this Agreement:

(a) the inclusion of headings and a table of contents are for convenience of reference only and are not to be considered or taken into account in construing the provisions of this Agreement or to in any way qualify, modify or explain the effect of any such provisions;

(b) unless the context otherwise requires, references to an Article, Section, Subsection, paragraph or Schedule, by number, letter or otherwise refer to the article, section, subsection, paragraph or schedule, as the case may be, bearing that designation in this Agreement;

(c) words importing the singular shall include the plural and vice versa and words importing a particular gender shall include all genders;

(d) wherever the words "**include**", "**includes**" or "**including**" are used, they shall be deemed to be followed by the words "**without limitation**" and the words following "**include**", "**includes**" or "**including**" shall not be considered to set forth an exhaustive list;

(e) the words "**hereof**", "**herein**", "**hereto**", "**hereinafter**", "**hereunder**", "**hereby**" and similar expressions shall be construed as referring to this Agreement in its entirety and not to any particular section or portion of it;

(f) all monetary amounts are expressed in United States currency; and

(g) where a term is defined in this Agreement, a derivative of that term shall have a corresponding meaning unless the context otherwise requires.

1.3 Business Days

If, pursuant to this Agreement, a notice must be given or an action taken within a specified period or on or before a specified date and such period ends on, or such date falls on a day that is not a business day, such notice may be given or such action may be taken on the next succeeding day which is a business day.

1.4 Schedules

The following Schedules are attached hereto and form a part of this Agreement:

Schedule "A"	Equipment
Schedule "B"	Leased Lands and Buildings
Schedule "C"	Forward Commitments
Schedule "D"	Assumed Liabilities
Schedule "E"	Non-Competition And Non-Solicitation Agreement
Schedule "F"	Security/Payout Leases
Schedule "G"	Permitted Security
Schedule "H"	Exceptions to Representations and Warranties of Vendor

Schedule "I"	Form of Bill of Sale
Schedule "J"	Form of Assignment Agreement

Wherever any term or condition, express or implied, of such Schedules conflicts or is at variance with any term or condition in the body of this Agreement, such term or condition in the body of this Agreement shall prevail

ARTICLE 2
PURCHASE AND SALE

2.1 Agreement of Purchase and Sale

Subject to the terms and conditions hereafter set forth, Vendor hereby agrees to sell, assign, transfer and convey its entire right, title and interest in the Assets and to assign the Assumed Lease to Purchaser and Purchaser agrees to purchase the Assets and assume the Assumed Lease from Vendor on the Closing Date for the aggregate purchase price of:

(a) $300,000.00 cash at Closing;

(b) Execution of the 2 year consulting agreement with Jon Fusco on the terms and conditions substantially similar to Schedule "K" (the "Consulting Agreement"); and

(c) 50% of the after tax profits of the Business for the first 2 full fiscal years from the Closing Date, payable within 90 days after Year End of the Business. Such calculation of profits shall net of all expenses. Expense deducted from the after tax profits shall include normal operating expense as well as such as amounts paid under the Consulting Agreement and a $100,000.00 annual management fee payable to Champion Weight Management Inc. (the "**Purchase Price**")

as adjusted in accordance with Section 2.3 and payable in accordance with Section 2.2. The Purchase Price is based upon the assumption that Purchaser will only assume the Assumed Liabilities of the Vendor.

2.2 Payment of Purchase Price

(d) The Purchase Price shall be payable by Purchaser to Vendor's Solicitors, at Closing, Three Hundred Thousand Dollars ($300,000.00) in cash, subject to adjustment in accordance with Section 2 3 (the "**Cash to Close**"), by wire transfer payable to Vendor's Solicitors.

(e) Vendor agrees to require the Vendor's Solicitors to pay the Purchase Price to the Vendor in the following order:

(i) first, to the satisfy and pay in full the Pay Out Leases;

(ii) second, the balance of the Purchase Price to the Vendor.

2.3 Adjustments

(a) All benefits and obligations of any kind and nature accruing, payable, paid, received or receivable with respect to the Forward Commitments shall be apportioned, as of the Closing Date, between Vendor and Purchaser in accordance with GAAP, subject to the provisions of this Agreement. All monies received by Vendor on account of goods and services not yet provided or performed on or by the Closing Date shall be for the account of Purchaser. All costs of whatever nature pertaining to work performed or goods or services provided with respect to the Forward Commitments of Vendor prior to the Closing Date shall be for the account of Vendor, notwithstanding that such costs may be payable, in whole or in part, after the Closing Date. All costs of whatever nature pertaining to work performed or goods or services provided with respect to the Forward Commitments of Vendor from and after the Closing Date shall be for the account of Purchaser.

(b) The Purchase Price is based upon the assumption that Purchaser will only assume the Assumed Liabilities of the Vendor.

2.4 Interim and Final Statement of Adjustments

(a) A final accounting and adjustment shall be conducted by Vendor and Purchaser within six (6) months following the Closing Date. Vendor and Purchaser shall not be obligated to make any adjustments after such six (6) month period unless such adjustment has been specifically requested, by notice within such period.

(b) Following Closing, and unless otherwise stipulated herein, all adjustments shall be settled by payment by the Party required to make payment hereunder within fifteen (15) days of being notified of the determination of the amount owing.

(c) During the six (6) month period following the Closing Date, Vendor may audit such books, records and accounts of Purchaser respecting the Forward Commitments as it may reasonably require solely for the purpose of effecting adjustments pursuant to this Section. Such audit shall be conducted upon reasonable notice to Purchaser at Purchaser's offices during Purchaser's normal business hours, and shall be conducted at the sole expense of Vendor. Vendor shall advise Purchaser, within the said six (6) month period, of any discrepancies and to the extent Vendor and Purchaser are unable to resolve any discrepancies disclosed by such audit, such discrepancies shall be resolved in accordance with Section 9.6 of this Agreement.

(d) During the six (6) month period following the Closing Date, Purchaser may audit the books, records and accounts of Vendor respecting the Forward Commitments as it may reasonably require solely for the purpose of effecting adjustments pursuant to this Section. Such audit shall be conducted upon reasonable notice to Vendor at Vendor's offices during its normal business hours, and shall be conducted at the sole expense of Purchaser. Purchaser shall advise Vendor, within the six (6) month period, of any discrepancies and to the extent Vendor and Purchaser are unable to resolve any discrepancies disclosed by such audit, such discrepancies shall be resolved in accordance with Section 9.6 of this Agreement.

ARTICLE 3
CLOSING

3.1 Place of Closing

Closing shall take place at the offices of Vendor's Solicitors on the Closing Date, or at such other place as the Parties hereto might agree.

3.2 Closing Date of Transfer

Except as otherwise specifically provided for herein, the assignment of the benefits associated with the Assets to Purchaser and the assumption of the obligations and risks associated with the Assets by Purchaser will be effective as of the Closing Date, provided Closing occurs. Possession of the Assets however, will not pass to Purchaser until completion of Closing.

3.3 Vendor's Deliveries at Closing

At Closing, Vendor shall deliver the following to Purchaser:

(a) Direction to Pay and Indemnity;

(b) an assignment of the Assumed Lease, with the written consent of the landlord;

(c) Vendor's records, files, reports and data pertaining to the Assets or an undertaking to provide Purchaser with same within a reasonable period of time following Closing, duly executed by Vendor;

(d) the Bill of Sale, duly executed by Vendor;

(e) the Assignment Agreement, duly executed by Vendor;

(f) a certificate of an officer of Vendor that (i) the representations and warranties found in Section 5 1 of this Agreement are true and correct at and as of the date of this Agreement and the Closing Date, with the same force and effect as if made then in each case, (ii) all of the Vendor's conditions precedent have been satisfied or waived, (iii) the covenants to be performed by Vendor prior to Closing have been duly performed, and (iv)that there have been no material changes to the Assets or the Business between the date the LOI was executed and the Closing Date;

(g) the Non-Competition and Non-Solicitation Agreement;

(h) payout statements, if available, for the Pay Out Leases; and

(i) such other documents as may be specifically required hereunder or as may be reasonably requested by Purchaser upon reasonable notice to Vendor.

3.4 Purchaser's Deliveries at Closing

At Closing, Purchaser shall deliver the following to Vendor or the Vendor's Solicitors, as applicable:

(a) the Cash to Close, as adjusted;

(b) the Offers of Employment duly executed by Purchaser;

(c) the Bill of Sale duly executed by Purchaser;

(d) a certificate of an officer of the general partner of the Purchaser certifying that (i) the representations and warranties found in Section 5.3 of this Agreement are true and correct at and as of the date of this Agreement and the Closing Date, with the same force and effect as if made then in each case, (ii) all of the Purchaser's conditions precedent have been satisfied or waived, and (iii) the covenants to be performed by Purchaser prior to Closing have been duly performed; and

(e) such other documents as may be specifically required hereunder or as may be reasonably requested by Vendor upon reasonable notice to Purchaser.

3.5 Costs of Registration

Purchaser shall bear all costs incurred in registering any conveyances of title to the Assets to it and all costs in preparing and registering any further assurances required to convey the Assets to it.

ARTICLE 4
CONDITIONS OF CLOSING

4.1 Vendor's Conditions

Vendor's obligations to complete the transactions contemplated by this Agreement are subject to satisfaction or waiver of the following condition on or by the Closing Date:

(a) Purchaser shall have delivered all items it is required to deliver pursuant to Section 3.4;

(b) the representations and warranties of Purchaser set forth in Section 5.3 shall be true and correct at and as of the date of this Agreement and the Closing Date, with the same force and effect as if made then in each case; and

(c) Purchaser shall have performed or complied with all of the terms, covenants and conditions of this Agreement to be performed or complied with by Purchaser at or prior to the Closing Date,

provided that, if any term, covenant or condition of Purchaser to be performed or complied with prior to the Closing Date shall not have been performed or complied with prior to the Closing Date, Vendor shall either: (i) rescind this Agreement by notice in writing to Purchaser and Vendor shall thereupon be released from all obligations hereunder and, unless the term, covenant or condition for which Vendor has rescinded this Agreement was reasonably capable of being performed or complied with by Purchaser, Purchaser shall also be released from all obligations hereunder; or (ii) waive compliance of any such term, covenant or condition in whole or in part, without prejudice to any of its rights of rescission in the event of non-performance of any other term, covenant or condition in whole or in part.

4.2 Purchaser's Conditions

Purchaser's obligation to complete the transactions contemplated under this Agreement is subject to the satisfaction or waiver of the following conditions on or by the Closing Date, unless otherwise provided for in this Section 4.2:

(a) Purchaser's obligation to close under this Agreement shall be conditional upon receiving approval from Jenny Craig International ("JCI") of such transfer.

(b) It is understood by the parties that approval of this Agreement by JCI may be contingent upon the Purchaser accepting certain additional terms and conditions ("Additional Terms and Conditions") of JCI upon the Purchaser. Such Additional Terms and Conditions may include a commitment by the Purchaser to open a second Memphis, Tennessee facility as soon as possible (within 6 months of the Closing Date) as well as construction of a third Jenny Craig facility in Memphis, Tennessee within 12-24 months from the Closing Date. Additionally, JCI may require renovation of the Jackson, Mississippi facility by the Purchaser within a six month of the Closing Date. In addition, JCI may require that Jon and Joanne Fusco not directly or indirectly have any ownership interest in [TN NEWCO], that Jon and Joanne Fusco may not have any direct management responsibilities in [TN NEWCO], and that all compliance activities with Jenny Craig will be performed by employees of [TN NEWCO] and/or Champion Weight Management Ltd.

(c) The acceptance of any such Additional Terms and Conditions of JCI upon the Purchaser shall be in the sole discretion of the Purchaser.

(d) Vendor shall have delivered all items it is required to deliver pursuant to Section 3.3,

(e) the representations and warranties of Vendor set forth in Section 5.1 shall be true and correct at and as of the date of this Agreement and the Closing Date, with the same force and effect as if made then in each case; and

(f) Vendor shall have performed or complied with all of the terms, covenants and conditions of this Agreement to be performed or complied with by Vendor at or prior to the Closing Date,

(g) Vendor shall have received all applicable third party consents to the assignment of the Assets as applicable; and

(h) at the Closing Date, there shall have been no material adverse change in the Assets or the Business;

provided that, if any term, covenant or condition of Vendor to be performed or complied with prior to the Closing Date shall not have been performed or complied with prior to the Closing Date, Purchaser shall provide written notice thereof to Vendor, and Vendor shall have five (5) business days from receipt thereof to remedy any such deficiency. If Vendor is unwilling or incapable of remedying such deficiency, then Purchaser may either: (i) rescind this Agreement by notice in writing to Vendor and Purchaser shall thereupon be released from all obligations hereunder and, unless the term, covenant or condition for which Purchaser has rescinded this Agreement was reasonably capable of being performed or complied with by Vendor, Vendor shall also be released from all obligations hereunder; or (ii) waive compliance of any such term, covenant or condition in whole or in part, without prejudice to any of its rights of rescission in the event of non-performance of any other term, covenant or condition in whole or in part.

ARTICLE 5
REPRESENTATIONS AND WARRANTIES

5.1 Vendor's Representations and Warranties

Vendor represents and warrants to Purchaser that, other than those items and matters set out in Schedule "H" attached hereto, with respect to Vendor and the Assets:

Corporate Standing, Power and Authorization

(a) Vendor is a corporation, organized under the laws of the State of • and has the power and capacity to own the Assets and to carry on its Business as now conducted by it and is duly qualified to carry on its Business in each jurisdiction in which the nature of its Business or the Assets makes such qualification necessary;

(b) Vendor has good and sufficient power, authority and right to enter into this Agreement and to complete the transactions to be completed by it contemplated hereby;

(c) the execution and delivery of this Agreement by Vendor and the consummation by Vendor of the transactions contemplated by this Agreement have been duly and validly authorized and will not violate, nor be in conflict with:

(i) any of the governing documents of Vendor;

(ii) to the best of Vendor's knowledge, any provisions of any agreement or instrument to which Vendor is a party or by which it is bound; or

(iii) to the best of Vendor's knowledge, any law applicable to Vendor or the Assets;

(d) this Agreement has been duly executed and delivered by Vendor and all other documents and instruments required hereunder to be executed and delivered by Vendor have and shall be duly executed and delivered and this Agreement does, and such documents and instruments will, constitute legal, valid and binding obligations of Vendor enforceable against Vendor in accordance with the respective terms of this Agreement and such documents and instruments, subject to applicable bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally and the discretionary nature of certain remedies (including specific performance and injunctive relief);

Assets of Vendor

(e) Vendor is and will be on the Closing Date, the owner of the Assets, with good and marketable title thereto and, other than the Permitted Security, the Assets will be free and clear of all mortgages, liens, charges, security interests, encumbrances, equities, pre-emptive rights of purchase (such as rights of first refusal), restrictions, deemed trusts or other claims and, other than the Permitted Security, Vendor has not encumbered or alienated the Assets or any interest therein and the Assets will be at the Closing Date free and clear of all liens, charges, encumbrances and adverse claims;

(f) Vendor has been receiving all revenues to which it is entitled by virtue of its ownership of the Assets and has not assigned such revenues to any person;

(g) Vendor has no knowledge, nor has it been informed of any material default or notice of material default relating to the Assets or any of them and Vendor has no knowledge and has not been informed of any substantial physical damage to or alteration in or to the Assets which would materially adversely affect the Assets;

(h) to Vendor's knowledge, there are no material claims, proceedings, actions, lawsuits, administrative proceedings or governmental investigations in existence, or, to the best of Vendor's knowledge, contemplated or threatened against or with respect to Vendor or the Assets which might result in impairment or loss of the Assets or which might otherwise adversely affect the Assets. Vendor is not aware of any existing basis upon which any of such claims, proceedings, actions or lawsuits might be commenced by any person;

(i) the operation of the Assets are in substantial compliance with all applicable laws;

(j) to Vendor's knowledge, all consents, licences, permits and approvals required for the operation of the Assets have been obtained, are validly issued and are in good standing;

(k) except as has been disclosed by the Purchaser in writing to the Vendor as herein contemplated, no Assets were acquired within the sixty (60) day period prior to the Closing Date;

(l) Purchaser may, upon Closing, take possession of, hold, own and operate the Assets without lawful interruption by Vendor or any person claiming by, through or under Vendor;

(m) Vendor has made available to Purchaser all material books and records, agreements, title and operating documents, contracts, correspondence and files in its possession or control pertaining to the Assets and has not knowingly withheld any such documentation from Purchaser affecting the Assets, Vendor's title to the Assets;

(n) The Vendor, or any third party contracting with the Vendor, is not in default or breach of any of the Forward Commitments to which it is a party;

(o) All Equipment included in the Assets is in good working order and condition having regard to the age thereof, has been properly maintained in accordance with any manufacturers recommendations and in accordance with generally accepted industry practices; and all of the warranties connected therewith will be delivered or made available to the Purchaser, except to the extent that such warranties are non-transferable or have expired prior to the Closing Date in accordance with their terms;

Books and Corporate Records

(p) the books and records of Vendor appropriately reflect the financial and accounting transactions pertaining to the Assets, have been maintained and will be maintained until the Closing Date in accordance with prudent business practice and disclose all material transactions relating to the Assets;

Taxes

(q) all *ad valorem*, income, property, severance and similar taxes and assessments based on or measured by the ownership of the Assets or the receipt of proceeds therefrom payable by Vendor in respect of the period prior to the Closing Date have been properly paid and discharged;

Financial

(r) other than the Permitted Security, Vendor does not have outstanding any bonds, debentures, mortgages, notes or other indebtedness and is not subject to any agreement to create any bonds, debentures, mortgages, notes or other indebtedness, including guarantees, indemnifications or like obligations and liabilities relating to the Assets except for operating costs relating to the Assets which are or will be incurred in the ordinary course of the Business;

Employment

(s) there is no lien against the Assets as a result of any worker's compensation legislation and to Vendor's knowledge the Worker's Compensation Board does not possess, nor is entitled to a claim or lien against the Assets or any of them due to any payments not being made to the Worker's Compensation Board. To the best of Vendor's knowledge, Vendor has complied with the requirements of all applicable employment legislation.

(t) Vendor is not a party to any collective bargaining agreement or other agreement with a trade union or other employees' association and except as disclosed in writing to the Purchaser, there are no currently existing employment benefit plans, arrangements or agreements to which Vendor is a party or by which it is bound; and

Affiliated Parties

(u) no associate or Affiliate of Vendor nor any of the Employees holds any interest in the Assets or the Business.

5.2 Survival of Vendor's Representations and Warranties

The representations and warranties of Vendor set forth in Section 5.1 shall survive the completion of the sale and purchase of the Assets herein provided for and, notwithstanding such completion shall continue in full force and effect for the benefit of Purchaser; provided that in the absence of fraud, no claim or action shall be commenced with respect to the breach of any such representation or warranty unless written notice of such claim together with reasonable particulars is provided to Vendor within two (2) years following the Closing Date.

5.3 Purchaser's Representations and Warranties

Purchaser represents and warrants to Vendor that:

Standing, Power and Authorization

(a) The Purchaser is a corporation duly established under the laws of the State of Tennessee and is validly existing under the laws of Tennessee;

(b) Purchaser has good and sufficient power, authority and right to enter into this Agreement and to complete the transactions to be completed by it as contemplated hereby;

(c) the execution and delivery of this Agreement by Purchaser and the consummation by Purchaser of the transactions contemplated by this Agreement have been duly and validly authorized and will not violate, nor be in conflict with:

(i) any of the governing documents of Purchaser;

(ii) to the best of the Purchaser's knowledge, any provisions of any agreement or instrument to which Purchaser is a party or by which it is bound; or

(iii) to the best of Purchaser's knowledge, any law applicable to Purchaser;

(d) this Agreement has been duly executed and delivered by Purchaser and all other documents and instruments required hereunder to be executed and delivered by Purchaser have and shall be duly executed and delivered by Purchaser and this Agreement does, and such documents and instruments will, constitute legal, valid and binding obligations of Purchaser enforceable against Purchaser in accordance with the respective terms of this Agreement and such documents and instruments, subject to any applicable bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally and the discretionary nature of certain remedies (including specific performance and injunctive relief);

Finder's Fees

(e) Purchaser has not incurred any obligation or liability contingent or otherwise, for brokerage fees, finder's fees, agent's commissions or other similar forms of compensation with respect to the transactions contemplated herein;

5.4 Survival of Purchaser's Representations and Warranties

The representations and warranties of Purchaser set forth in Section 5.3 shall survive the completion of the sale and purchase of the Assets herein provided for and, notwithstanding such completion shall continue in full force and effect for the benefit of Vendor; provided that in the absence of fraud, no claim or action shall be commenced with respect to the breach of any such representation or warranty unless written notice of such claim together with reasonable particulars is provided to Purchaser within two (2) years following the Closing Date.

5.5 No Merger

The representations and warranties in Sections 5.1 and 5.3 of this Agreement shall be deemed to apply to all assignments, conveyances, transfers and other documents conveying the Assets from Vendor to Purchaser. There shall not be a merger of any of such representations or warranties in such assignments, conveyances, transfers or other documents, notwithstanding any rule of law, equity or state to the contrary, and all such rules are hereby waived.

ARTICLE 6
COVENANTS

6.1 Fulfillment of Obligations in Good Faith

Each of the Parties agrees that it shall fulfill all of its obligations under this Agreement in good faith, with a view to giving effect to and implementing the terms of this Agreement in accordance with its true intent.

Without limiting the generality of the foregoing, Purchaser covenants and agrees that it will fulfill all obligations under the Forward Commitments in good faith.

6.2 Certain Assets to be Held in Trust

Vendor agrees to continue to hold any Assets which cannot immediately be transferred to Purchaser on the Closing Date, in trust, to and for the benefit of Purchaser after the Closing Date and agrees, at the request of Purchaser, to transfer such Assets to Purchaser, as Purchaser shall so direct, and to obtain all necessary consents and approvals therefore.

ARTICLE 7
LIABILITIES AND INDEMNITIES

7.1 Vendor's Liabilities and Indemnities

Provided Closing occurs, Vendor shall:

(a) be liable to Purchaser, its Affiliates and their respective directors, officers, shareholders, servants, agents and employees, or any of them (the "**Purchaser Group**") for all losses, costs, damages and expenses whatsoever, ("**Losses**") which Purchaser Group, or any of them, may suffer, sustain, pay or incur; and

(b) as a separate and independent covenant, indemnify and save Purchaser Group, and each of them, harmless from and against all claims, actions, proceedings, demands, and Losses, whatsoever which may be brought against or suffered by Purchaser Group or any of them or which any of them may suffer, sustain, pay or incur;

as a result of any matter or thing arising out of, resulting from, attributable to or connected with: (i) the Assets occurring or accruing on or before the Closing Date; (ii) a breach by Vendor of its representations, warranties and covenants set forth in this Agreement; and (iii) all Assumed Liabilities occurring or accruing on or before the Closing Date. Notwithstanding any provision herein, in the absence of fraud, the liability of Vendor and the indemnity granted by Vendor to Purchaser Group shall only apply if written notice of such claim hereunder together with reasonable particulars is provided to Vendor within two (2) years following the Closing Date.

7.2 Purchaser's Liabilities and Indemnities

Provided Closing occurs, Purchaser shall:

(a) be liable to Vendor, its Affiliates and their respective directors, officers, shareholders, servants, agents and employees, or any of them (the "**Vendor Group**") for all Losses which Vendor Group or any of them, may suffer, sustain, pay or incur; and

(b) as a separate and independent covenant, indemnify and save Vendor Group, and each of them, harmless from and against all claims, actions, proceedings, demands, and Losses, whatsoever which may be brought against or suffered by Vendor Group, or any of them or which any of them may suffer, sustain, pay or incur;

as a result of any matter or thing arising out of, resulting from, attributable to or connected with: (i) the Assets occurring or accruing after the Closing Date; (ii) a breach by Purchaser of its representations, warranties and covenants set forth in this Agreement; and (iii) all Assumed Liabilities occurring or accruing after the Closing Date. Notwithstanding any provision herein, in the absence of fraud, the liability of Purchaser and the indemnity granted by Purchaser to Vendor Group shall only apply if written notice of such claim hereunder together with reasonable particulars is provided to Purchaser within two (2) years following the Closing Date.

7.3 Limitations on Indemnity and Liability

Notwithstanding anything to the contrary contained in this Agreement, no Party will be liable hereunder for any damages, costs, expenses, injuries, losses or other liabilities of an indirect, special or consequential nature suffered by any other Party or claimed by a third party against any other Party, or any exemplary or punitive damages, costs or expenses or loss of profits suffered by any other Party.

ARTICLE 8
EMPLOYMENT MATTERS

8.1 Offers to Employees

Following execution of this Agreement, the Vendor shall advise all of the Employees of the transaction and shall encourage all Employees to accept employment with the Purchaser effective on the Closing Date. As soon as possible thereafter, the Purchaser shall deliver or cause to be delivered, the Offers of Employment to the Employees. Purchaser agrees to hire all Employees who accept the offers. Vendor shall be liable and responsible for any employees who do not accept Purchaser's Offers of Employment. Vendor shall cooperate with Purchaser with respect to the retention of any employees to whom Purchaser proceeds to make an Offer of Employment. With respect to Employees who accept Offers of Employment with Purchaser (hereinafter referred to as "**Accepting Employees**"), Purchaser shall be responsible for all obligations in respect of the Accepting Employees including for salary, benefits, overtime, vacation pay, bonuses and the like, and for all liabilities and obligations on account of the termination, wrongful or otherwise, of any Accepting Employees by Purchaser after the Closing Date.